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PLEADING AND PRACTICE
OF
THE HIGH COURT OF CHANCERY,

BY
EDMUND ROBERT DANIELL, F. R. S.,
A COMMISSIONER OF THE COURT OF BANKRUPTCY.

THIRD ENGLISH EDITION:

WITH CONSIDERABLE ALTERATIONS AND ADDITIONS, ADAPTING THE TEXT TO
THE LAST GENERAL ORDERS AND THE MOST RECENT DECISIONS
OF THE COURT.

BY
THOMAS EMERSON HEADLAM, M. P.,
ONE OF HER MAJESTY'S COUNSEL.

THIRD AMERICAN EDITION:

TO WHICH ARE ADDED SEVERAL ENTIRELY NEW CHAPTERS, AND COPIOUS NOTES,
TOGETHER WITH AN APPENDIX OF PRECEDENTS, ADAPTING THE WORK TO

AMERICAN PRACTICE IN CHANCERY,

BY
J. C. PERKINS.

IN THREE VOLUMES.
VOL. II.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1865.

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1865
v.2

Entered according to Act of Congress, in the year 1865, by
J. C. PERKINS,
in the Clerk's Office of the District Court of the District of Massachusetts.

UNIVERSITY PRESS: WELCH, BIGELOW, & Co.,
CAMBRIDGE.

MS. 10 June 59

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OF
THE HIGH COURT OF CHANCERY.
VOLUME II.

SECTION IV.

Cases of Election.

WHERE the plaintiff is suing both at Law and in Equity, at the same time, for the same matter, the defendant is entitled to an order that the plaintiff may elect whether he will proceed with the suit in Equity, or with the action at Law.¹

This practice seems to have originated in an order of Lord Bacon, according to which, "Double vexation is not to be admitted: but if the party sue for the same cause at Common Law and in Chancery, he is to have a day given to make his election where he will proceed, and, in default of such election, to be dismissed."²

As the remedies given at Law and in Equity are necessarily different, it is sometimes a question of difficulty to determine whether a suit and an action are so far identical in their object, as to give the defendant a right to call upon the plaintiff to elect between the two. In the case of *Fennings v. Humphery*,³ the bill was for specific performance; the action at Law was for the non-performance of particular acts stipulated for by the agreement. Lord Langdale, M. R., upon the special circumstances of the case, having regard to the extent of remedy which a Court of Equity could give in the case, and the limited nature of the damages sought for at Law, refused to make the plaintiff to elect. This case was however decided upon particular grounds; and, in general, it may be stated that the Court will compel a plaintiff to elect between a suit in Equity for specific performance of an agreement, and an action at Law brought in respect of the same agreement;⁴ and this rule applies as well before as after a decree.⁵

¹ *Livingston v. Kane*, 3 John. Ch. 224; *Sanger v. Wood*, Ib. 416; *Rogers v. Vosburgh*, 4 John. Ch. 84; *Gibbs v. Perkinson*, 4 Hen. & Munf. 415. Where the remedies at Law and in Equity are inconsistent, any decisive act of the party, under either jurisdiction, with knowledge of his rights and of the facts, determines his election. *Sanger v. Wood*, *ubi supra*. See *Combs v. Tarlton*, 2 B. Monroe, 194. For form of order, see 2 Seton Dec. (3d Eng. ed.) 947.

² 18th Order, Beames's Orders, p. 11. The Court will allow the party a reasonable time to make his election. *Brocken v. Martin*, 3 Yerger, 55.

³ 4 Beav. 1.

⁴ *Carwich v. Young*, 4 Mad. 437; *Reynolds v. Nelson*, 6 Mad. & Geld. 18.

⁵ *Frank v. Basnett*, 2 M. & K. 618; *Orme v. Broughton*, 10 Bing. 538; *Cooper v. Fry*, Coop. 107, and 19 Ves. 278.

So also, as a general rule, a party suing in Equity is not allowed to sue at Law for the same debt. But the case of a mortgagee is an exception to this rule; it is frequently said, that he may pursue all his remedies concurrently; at any rate, he can proceed on his mortgage in Equity, and on his bond at Law at the same time.¹ Whether this exception depends upon a peculiar privilege of a mortgagee, or upon the nature of a foreclosure suit, does not seem clear.²

But in the case of *Barker v. Smark*,³ Lord Langdale, M. R., refused to extend the exception to the case of a vendor, who had commenced an action at Law upon a bond for his unpaid purchase-money, and at the same time was suing in Equity to establish a lien upon the estate for the same sum.

The principle of election would also seem to apply where there is one suit in this country, and another for the same matter in a foreign court of competent jurisdiction, — in *Pieters v. Thompson*, it being proved that the plaintiff had elected to proceed abroad, Lord Eldon stayed proceedings in this country.⁴

It seems that, in a particular case, the plaintiff may be allowed to proceed partially in Equity, and partially at Law, and compelled to enter into a special election.⁵

With respect to the period in the cause at which a motion to compel election may be made, it appears, in the first place, that a defendant has never been permitted to apply before he has put in his answer.⁶ After he has answered, the time when he becomes entitled to obtain an order for the plaintiff to elect is now regulated by the Orders of the 2d of November, 1850, the 7th of which directs, “That a defendant, whose answer is not excepted to or set down for hearing on former exceptions, alleging that the plaintiff is prosecuting him in this Court, and also at Law, for the same matter, may, upon the expiration of eight days after his answer, or further answer is filed, obtain, as of course, on motion or petition,

¹ *Schoole and Wife*, 1 Sch. & Lef. 176.

² *Booth v. Booth*, 2 Atk. 343.

³ 3 Beav. 64.

⁴ *Coop.* 294.

⁵ *Anon.* 1 Vern. 104. Observation of Lord Hardwicke, 3 Atk. 129; and see *Trimleston v. Kemmis*, Lloyd & Goold, 29. For form of the order see 2 Seton Dec. (3d Eng. ed.) 948.

⁶ *Tillotson v. Ganson*, 1 Vern. 103. See *Houston v. Sadler*, 4 Stew. & Port. 130; *Rogers v. Vosburg*, 4 John. Ch. 84.

the usual order for the plaintiff to make his election in which Court he will proceed." And the 13th of the same Order directs "That a defendant whose answer is excepted to, alleging that the plaintiff is prosecuting him in this Court and also at Law for the same matter, may, by notice in writing, require the plaintiff to set down the exceptions, within four days from the service of the notice. And if the plaintiff does not set down such exceptions within such four days, such defendant is entitled as of course, on motion or petition, to obtain the usual order for the plaintiff to make his election in which Court he will proceed." ¹

We have before seen that for many purposes a plea is included in the term answer; ² but under the old practice it was decided, that neither a plea nor a joint plea and answer was so far an answer to the bill, as to entitle a defendant to move for an order for the plaintiff to elect; ³ and it does not seem that there is anything in the present Orders to affect this decision.

The order to elect is obtained as of course, and is not within the discretion of the Court. ⁴ It is made upon the suggestion that the plaintiff is prosecuting the defendant both at Law and in this Court for one and the same matter, whereby the defendant is doubly vexed.

By the terms of the order, the plaintiff and his solicitor, having notice thereof, shall within eight days after such notice make his election in which Court he will proceed, and if the plaintiff should elect to proceed in this Court, then the plaintiff's proceedings at Law are to be stayed by injunction; but if the plaintiff should elect to proceed at Law, then the plaintiff's bill is from thenceforth to stand dismissed out of this Court as against the defendant, with costs. ⁵

When the defendant has obtained such an order, the plaintiff may move to discharge it either for irregularity or upon the merits confessed in the answer; if upon such a motion there should be any doubt as to whether the suit in Equity, and the action at Law,

¹ *Browne v. Poyntz*, 3 Mad. 24; *Leicester v. Leicester*, 10 Sim. 87; *Coupland v. Braddock*, 5 Mad. 14.

² See ante, pp. 712, 713.

³ *Fisher v. Mee*, 3 Mer. 45.

⁴ *Royle v. Wynne*, Cr. & Ph. 255.

⁵ *Boyd v. Heinzehn*, 1 V. & B. 382; *Jones v. Earl of Strafford*, 3 P. Wms. 90. See *Livingston v. Kane*, 3 John. Ch. 224; *Rogers v. Vosburg*, 4 John. Ch. 84.

are for the same matter, it is the usual course to refer it to the Master to inquire into that fact.¹ In the event of such a reference being made, it seems that all the proceedings in both Courts are stayed in the mean time,² unless the plaintiff can show that justice will be better done by permitting proceedings to any extent, in which case it is for him to ask for leave to proceed and to state his reasons. Lord Eldon stated his opinion to be, that an injunction to stay proceedings during the reference ought to be inserted as a matter of course ; but that the order of reference implied an order to stay the proceedings whether it be asked for or not ;³ and in the case of *Carwick v. Young*,⁴ he also said that “on a search in the Registrar’s office, the result of which had been communicated to him, the general rule appeared to be, that the plaintiff is not at liberty after an order for election to proceed either at Law or in Equity, but the Court in the particular circumstances of each case will give liberty to proceed as those particular circumstances require ; and accordingly in some of the orders the party has been allowed to proceed, in others, he has been directed to give judgment with an express restraint against taking out execution. There is no case in which the Court would not modify the rule according to circumstances.”

In the case of *Hogue v. Curtis*,⁵ the defendant did not obtain the common order, but moved specially that the plaintiff should elect to proceed at Law or in Equity, and for an injunction in the mean time, and it being clear to the Court that the proceedings were for the same matters, an order to that effect was made.

By the 16th Order of October, 1842, solicitors are enabled to sign elections and agreements to proceed at Law or in Equity.⁶

The election must be left at the Report Office to be filed, and notice thereof given to the defendant’s solicitor.

¹ *Young v. Lucas*, cited 1 V. & B. 383.

² *Mills v. Fry*, 3 V. & B. 9 ; Anon. 1 Ves. jr. 91 ; For. Rom. 200.

³ *Amory v. Brodrich*, Jac. 533 ; see, however, observations of Lord Langdale in *Fennings v. Humphery*, 4 Beav. 8.

⁴ 2 Sw. 243.

⁵ 1 J. & W. 449.

⁶ The election may be in the following form : —

In Chancery. Between *A. B.* and others, Plaintiffs. *C. D.* Defendant.

In pursuance of an Order dated the — day of —, the plaintiff hereby elects to proceed in this Court.

Dated this — day of —.

Smith’s C. P., 3d edit., p. 720.

If the plaintiff elects to proceed in Equity, it seems that an injunction will issue without further order as of course. If the plaintiff elects to proceed at Law, the defendant becomes entitled to an order that the bill shall be dismissed with costs;¹ but it has been before stated that the dismissal of the bill, in consequence of an election by the plaintiff to proceed at Law, cannot be pleaded in bar to another suit for the same matter.²

It has before been stated, that, in contradistinction to the ordinary cases of election, there is another class of cases which are not, properly speaking, cases of election, where the proceeding at Law is ancillary to that in Equity. There the form of the application is different, that, if the plaintiff shall elect to proceed at Law, the suit may be stayed in the mean time; for in those cases the Court has a discretionary power to mould the proceedings with a view to its own decree, and for that purpose may retain the bill until the action shall have been disposed of.³

With reference to this subject it may, lastly, be observed, that a defendant may also apply to the Court⁴ to dismiss a bill with costs in a case in which the bill has upon the hearing been retained for a certain period, with liberty for the plaintiff to bring an action at Law against the defendant, and to try the same within that time, but the plaintiff does not avail himself of that liberty. The most effectual course, however, for a defendant to adopt, under such circumstances, is to set the cause down again for hearing upon further directions, and to get it dismissed with costs, which it seems he may do, although no further directions are reserved in the order dismissing the bill.⁵

¹ *Jones v. Earl of Strafford*, 3 P. Wms. 90, n. B.

² *Ante*, p. 813. See *Countess of Plymouth v. Bladon*, 2 Vern. 32.

³ See *ante*, p. 658; and *Royle v. Wynne*, Cr. & Ph. 252.

⁴ *Dobede v. Edwards*, 11 Sim. 454.

⁵ *Stevens v. Praed*, 2 Cox, 374.

CHAPTER XIX.

MOTION FOR A DECREE.

THE practice of moving for a decree is of recent date, having been recommended by the Chancery Commissioners, and authorized by the recent Act for the Amendment of the Practice of the Court.¹ By the 15th section of this Act, it is enacted, "That the plaintiff in any suit commenced by bill shall be at liberty, at any time after the time allowed to the defendant for answering the same shall have expired (but before replication), to move the Court upon such notice,² as shall in that behalf be prescribed by any general order of the Lord Chancellor for such decree or decretal order as he may think himself entitled to."

In consequence of this enactment, a plaintiff should now, previous to filing a replication, consider whether he cannot expedite the termination of the suit by at once moving for a decree. He cannot adopt this course until the defendants have answered, or rather until the time allowed them for answering has expired, and it is expressly provided by section 13, that, "If the Court shall grant any further time to any defendant for pleading, answering, or demurring to the bill, the plaintiff's right to move for a decree, under the provisions contained in the foregoing sections, shall in the mean time be suspended." On the other hand, it would appear that a motion for a decree by the plaintiff will be considered as an admission by him of the sufficiency of the answer.³ It will be observed that this mode of proceeding applies only to suits commenced by bill, and consequently cannot be adopted in suits commenced by claim.

This course of moving for a decree is a very convenient and suitable one in all cases where there is little doubt of the precise nature of the decree to which the plaintiff is entitled, and where also he will be enabled to establish his right to such a decree by affidavit, and without a regular oral examination of witnesses. By the 16th section,⁴ "Upon any such motion for a decree or de-

¹ 15 & 16 Vict. c. 86.

² The notice may be served on a defendant out of the jurisdiction; *Meek v. Ward*, 10 Hare, Appx. 55.

³ *Boyce v. Cokell*, 18 Jur. 770.

⁴ 15 & 16 Vict. c. 86.

cretal order it shall be discretionary with the Court to grant or refuse the motion, or to make an order, giving such directions for or with respect to the further prosecution of the suit as the circumstances of the cases may require, and to make such order as to costs as it may think right.”¹ It would appear that the Court has no power upon the motion to make any other decree than that asked for by the notice of motion ; but upon a motion for a decree according to the prayer of the bill, the same relief will be granted as upon the hearing of a cause.²

With respect to the evidence, it is enacted by the 15th section, that “The plaintiff or defendant respectively shall be at liberty to file affidavits in support of and in opposition to the motion so to be made, and to use the same on the hearing of such motion ; and if such motion shall be made after an answer filed in the cause, the answer shall, for the purposes of the motion, be treated as an affidavit.” It would appear from this section, at first sight, that the only evidence to be adduced on motions for a decree would be evidence by affidavit ; but it must be recollected that by the 40th section, “Any party in any cause or matter depending in the said Court may, by a writ of subpœna ad testificandum or duces tecum,³ require the attendance of any witness before an examiner of the said Court, or before an examiner specially appointed for the purpose, and examine such witness orally for the purpose of using his evidence upon any claim, motion, petition or other proceeding before the Court, in like manner as such witness would be bound to attend and be examined with a view to the hearing of a cause ; and any party having made an affidavit to be used or which shall be used on any claim, motion or petition, or other proceeding before the Court, shall be bound, on being served with such suit, to attend before an examiner, for the purpose of being cross-examined :⁴ Provided always, that the Court shall have always a discretionary power of acting upon such evidence as may be before it at the time, and of making such interim orders or otherwise, as may appear necessary to meet the justice of the case.”

Although this section gives the power to a party in a cause to

¹ See *Gwyon v. Gwyon*, 1 Kay & J. 211.

² *Norton v. Steinkopf*, 1 Kay, Appx. 10.

³ An order may be obtained for the production of an original will on a motion for a decree ; *Wigan v. Rowland*, 10 Hare, Appx. 13.

⁴ *Williams v. Williams*, 17 Beav. 156.

adduce evidence by the production of witnesses on a motion for a decree, yet, in practice, the evidence upon such occasions is usually given by affidavits. And this seems to have been the view of the Judges of the Court, who, by the 23d Order of August, 1852, have directed that "The affidavits to be used in support of such motion are to be filed before the service of such notice, and a list of such affidavits is to be set forth at the foot of such notice."

If the notice be served on a defendant out of the jurisdiction, the time for filing affidavits in reply must be specified in the order for leave to serve, which is to be drawn up and served with the notice ; but it is discretionary whether copies of the plaintiff's affidavits should be served.¹ This Order does not in terms apply to the evidence to be adduced orally by witnesses, but the 36th of the same Orders directs that "Any party in any cause or matters requiring the attendance of any witness before an examiner, for the purpose of his being examined or cross-examined, with a view to his evidence being used upon any claim, motion, petition or other proceeding before the Court, not being the hearing of a cause, shall give to the opposite party or parties forty-eight hours' notice at least of his intention to examine such witness, and of the time and place of such examination, unless the Court shall in any case think fit to dispense with such notice." By the 22d of the same Orders, "One month's notice is to be given by the plaintiff to the defendant or defendants of the motion for a decree or decretal order."²

After the defendant has received the notice, the 24th of the same Orders directs that, "Within fourteen days after service of such notice, he is to file his affidavits in answer, and to furnish the plaintiff or his solicitor with a list thereof." We have seen that the answer of the defendant may be used as an affidavit, but it need not be specified in the list unless it is to be read as evidence against another defendant.³

The defendant appears to have the same power as the plaintiff of examining a witness, and of course is subject in the same manner to the provisions of the 40th section.

¹ *Meek v. Ward*, 10 Hare, Appx. 55.

² And if the cause is not set down with the Registrar within the month, the Court will not afterwards order it to be set down except on motion with notice to the defendant ; *Boyd v. Jagger*, 10 Hare, Appx. 54 ; 17 Jur. 635.

³ *Cousens v. Vasey*, 9 Hare, Appx. 61.

After the defendant has filed his affidavits, the plaintiff can file affidavits in reply, and the 25th Order directs that, "Within seven days after the expiration of such fourteen days, the plaintiff is to file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and he is to furnish the defendant or his solicitor with a list thereof; and, except so far as these affidavits are in reply, they are not to be regarded by the Court, unless upon the hearing of the motion the Court shall give leave to the defendant to answer them; and in that case the costs of such affidavits, and of the further affidavits consequent upon them, shall be paid by the plaintiff, unless the Court shall otherwise order, after the affidavits in reply are filed."

Moreover, by an Order of the 1st of June, 1854, it is directed, that "If the fourteen days within which, pursuant to the Orders of the Court, a defendant is bound to file his affidavits in answer to a motion for a decree, or the seven days within which the plaintiff is bound to file his affidavits in reply thereto, or the nine weeks after issue joined, within which the evidence in any cause to be used at the hearing thereof is to be closed, or the month after the expiration of such nine weeks, within which a witness who has made an affidavit intended to be used by any party to such cause at the hearing thereof is subject to cross-examination, shall expire in the long vacation, the time for the several purposes aforesaid respectively is hereby extended to the fifth day of the ensuing Michaelmas Term, and is to expire on that day unless enlarged by order: provided always, that in cases where the above-mentioned periods of fourteen days and nine weeks respectively shall be extended by virtue of this Order, the seven days within which the plaintiff is bound to file his affidavits in reply, and the month during which a witness is subject to cross-examination, shall be respectively taken to commence from the expiration of such extended period. By the 26th Order, "No further evidence on either side is to be used upon such motion for a decree or decretal order, without leave of the Court." ¹

By the 27th Order, "Every notice of motion for a decree or decretal order is to be entered with the Registrar, who is to make out a list of such motions, and the same are to be heard according to such list, unless the Court shall make order to the contrary."

¹ The application cannot be made *ex parte*; *Richards v. Curlew*, 18 Beav. 462.

The consequence of this Order is, that a motion for a decree is set down, like the hearing of a cause, and comes on in its turn ; and, under fit circumstances, will be taken as a short cause before the expiration of the month required by the 22d section.¹ In other respects the hearing of such a motion is similar to the hearing of other motions.

It appears that the motion for a decree should be entered with the Registrar at the same time that the notice is given.

It has been decided that a plaintiff, who has given notice of motion for a decree, may obtain an order of course to amend his bill after the defendant has filed his affidavits in opposition to the motion.²

CHAPTER XX.

OF REPLICATION.

If the plaintiff does not adopt the course mentioned in the last Chapter, namely, moving for a decree, he must consider whether sufficient is admitted by the answer to enable him to go to a hearing of the cause, as it stands, upon bill and answer, or whether it will be necessary to file a replication, or enter into evidence.

If upon the answer alone, without further proof, there is a sufficient ground for a final decree, the plaintiff should proceed to a hearing, without replying or examining witnesses.

The plaintiff must, however, bear in mind, that on a hearing upon bill and answer, the answer will be taken to be true against him in every point,³ because the defendant has been precluded from substantiating it by evidence. It not unfrequently therefore happens, that though the plaintiff needs no witness on his

¹ Ames v. Ames, 10 Hare, Appx. 54.

² Gill v. Rayner, 1 Kay & J. 395.

³ Contee v. Dawson, 2 Bland, 264 ; Childs v. Horr, 1 Clarke (Iowa), 432 ; Rogers v. Mitchell, 41 New Hamp. 154 ; Pierce v. West, 1 Peters C. C. 351 ; Pickett v. Chilton, 5 Munf. 467 ; Scott v. Clarkson, 1 Bibb, 277. But where the cause is set down for hearing on bill, answer, and depositions, the replication is mere form, and the Court will suffer it to be filed *nunc pro tunc*. Scott v. Clarkson, *ubi supra* ; Demaree v. Driskill, 3 Blackf. 115 ; Pierce v. West, *ubi supra* ; Glenn v. Hebb, 12 Gill & J. 271 ; Armistead v. Bozman, 1 Ired. Ch. 117 ; Smith v. West, 3 John. Ch. 363. See Reading v. Ford, 1 Bibb, 338.

part, yet he must reply to the answer, for the purpose of putting the defendant to prove the allegations in his answer, and prevent the answer being taken to be true in every particular, as when he confesses the matter alleged by the plaintiff, but sets forth some further matter in bar of the plaintiff's equity.¹ By replying to the answer, the plaintiff does not preclude himself from reading any part of the answer he may consider essential to assist his case.

If, upon consideration of the matter, the plaintiff is advised that the answer of the defendant, or of some of the defendants, will not allow him to proceed to a hearing in reply upon bill and answer, he must file a replication.² A replication must also be put in when the defendant has pleaded to the bill, whether the plea be accompanied by an answer or not. It is, however, to be recollected, that if the plaintiff replies to a plea before it is argued, he admits the plea to be valid, if true,³ and he cannot object to it afterwards on the ground of its invalidity or irregularity.

By the 93d Order of May, 1845, it is directed, that "No subpoena to rejoin is hereafter to be issued, and only one replication is to be filed in each cause, unless the Court otherwise orders ;"⁴

¹ See *Tunstall v. McClelland*, Hardin, 519.

² In Maine, "within thirty days after the answer is filed, unless exceptions are taken, or within fifteen days after it is perfected, the plaintiff's counsel shall file the general replication, and give notice thereof; or give notice of a hearing at the next term on bill and answer." Rule 9, of Chancery Practice. See Rule 17, N. Hamp. Chancery Practice, 38 N. Hamp. 608. If the plaintiff wishes to prove any fact, on the hearing, not admitted by the answer, he must file a replication. *Mills v. Pittman*, 1 Paige, 490.

³ *Hughes v. Blake*, 6 Wheaton, 472; *S. C.* 1 Mason, 515; *Daniels v. Taggart*, 1 Gill & John. 312; *Brooks v. Mead*, Walk. Ch. 389; *Bellows v. Stone*, 8 N. Hamp. 280; *Newton v. Thayer*, 17 Pick. 129; *Hurlburt v. Britain*, Walk. 454.

Upon a replication to a plea, nothing is in issue except what is distinctly averred in the plea. *Fish v. Miller*, 5 Paige, 26.

⁴ By 45th Equity Rule of the United States Courts, no special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the Court, or a Judge thereof may in his discretion direct.

In Massachusetts, "no special replication to an answer shall be filed, but by leave of the Court, or one of the Justices thereof for cause shown; and, as a substitute for the general replication now in use, the plaintiff shall enter in the cause, that he joins issue on the answer." Rule 14, of the Rules for Practice in Chancery. In New Hampshire, a replication shall be entitled as an answer, and shall

and the replication is to be in the form set forth at the foot of this Order, or as near thereto as circumstances admit and require; and upon the filing of such replication, the cause is to be deemed to be completely at issue, and each defendant may, without any rule or order, proceed to examine his witnesses, and the plaintiff may in like manner proceed to examine his witnesses, so soon as evidence of the replication being filed has been duly served on all the defendants who have filed an answer or plea, or against whom a traversing note has been filed.”¹

The replication is in the following form:—

Between A. B. Plaintiff,
and
C. D., E. F., G. H., &c. Defendants.

The plaintiff in this cause hereby joins issue with the defendant C. D., and will hear the cause on bill and answer against the defendant E. F., (all the defendants against whom the cause is to be heard on bill and answer), or on the order to take the bill as confessed against the defendant G. H.²

The signature of counsel to a replication is not necessary.

It is prepared by the solicitor of the plaintiff, written upon parchment, and filed at the Record and Writ Clerks' Office; and the solicitor must on the same day give notice thereof to the solicitors of all the defendants.

The recent Chancery Amendment Act, sect. 26, provides that, “In suits commenced by bill, where notice of motion for a decree or decretal order shall not have been given, or having been given,

be in substance, “The plaintiff says his bill is true, and the defendant's answer, as set forth, is not true, and this he is ready to prove.” Rule 22, of Chancery Practice. See Story Eq. Pl. § 878; *Storms v. Storms*, 1 Edw. Ch. 358; *Dupote v. Massy*, Cox's Dig. 146; *Brown v. Ricketts*, 2 John. Ch. 425; *Lyon v. Tallmadge*, 1 John. Ch. 184; *Livingston v. Gibbons*, 4 John. Ch. 94; *Thorn v. Germand*, Ib. 363; *Pratt v. Bacon*, 10 Pick. 123. If the plaintiff files a replication to the answer after he is apprized of the necessity for an amendment of his bill, he precludes himself from making such amendment. *Vernilyea v. Odell*, 4 Paige, 121.

¹ In America, generally, if not universally, the pleadings terminate with the replication, and no rejoinder is filed; and the case is deemed at issue upon the filing of the replication. This is the general practice in the Courts of the United States. Story Eq. Pl. § 879, note; 66th Equity Rule of the United States Courts; Rule 27, of the Reg. of Prac. in Chan. in Massachusetts.

² For a form of a general replication, see Story Eq. Pl. § 878, note; *Barton Suits in Equity*, 144, 145.

when a decree or decretal order shall not have been made thereon,¹ issue shall be joined by filing a replication, to the form and effect of the replication now in use; and where a defendant shall not have been required to answer, and shall not have answered the plaintiff's bill, he shall be considered to have traversed the case made by the bill."²

By the 28th Order of August, 1852, "Where a defendant shall not have been required to answer, and shall not have answered the plaintiff's bill, so that under the 26th section he is to be considered as having traversed the case made by the bill, issue is nevertheless to be joined by filing a replication in the form or to the effect of the replication now in use."³

With respect to the time when a replication should be filed, it may be observed, in the first place, that when an answer is filed, the plaintiff may reply to it immediately; but by the 16th Order of May, 1845, "When the plaintiff amends his bill, without requiring an answer to the amendment, and no answer is put in thereto, and no warrant for further time to answer the same is served within eight days after service of the notice of the amendment of such bill, the plaintiff is, after the expiration of such eight days, but within fourteen days from the time of such service, either to file his replication, or to set down the cause to be heard upon bill and answer, otherwise any defendant may move to dismiss the bill for want of prosecution." By the 40th article of the same Order, "Where the plaintiff amends his bill without requiring an answer to the amendments, and a defendant, within eight days after the service of the notice of the filing of the amended bill, serves a warrant for further time to answer the amendments, but the Master refuses to grant such further time, the plaintiff is, within fourteen days after such refusal, either to file his replication, or to set down the cause to be heard on bill and answer, otherwise any defendant may move to dismiss the bill for want of prosecution."⁴

¹ See *Duffield v. Sturges*, 9 Hare, Appx. 88, as to the meaning of this section.

² Under fit circumstances, notice of the filing of the replication may be advertised if it cannot be served; *Barton v. Whitcombe*, 17 Jur. 81; 16 Beav. 206.

³ *Duffield v. Sturges*, 9 Hare, Appx. 87.

⁴ See 66th Equity Rule of the United States Courts; Rule 15, of the Reg. of Prac. in Chan. in Mass. In reference to extending the time to reply, in New York, see *The Sea Ins. Co. v. Day*, 9 Paige, 247; *Kane v. Van Vranken*, 5 Paige, 63. If the plaintiff wishes to amend his bill, and a special application to the

By the 41st article of the same Order, "If a defendant puts in an answer to amendments, to which the plaintiff has not required an answer, the plaintiff must, within fourteen days after the filing of the bill, either file his replication, or set down the cause to be heard on bill and answer, unless in the mean time he obtains from the Court a special order for leave to except to such answer, or to amend the bill, otherwise any defendant may move to dismiss the bill for want of prosecution."

We have before seen that, after a replication has been filed, a plaintiff, if he wishes to withdraw it, and amend his bill further than by adding parties, must make a special application for leave so to do; in which case, in addition to the affidavits usually required, when an application for leave to amend, a further affidavit is necessary, showing that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into the bill.

A plaintiff has also been permitted, on motion, to withdraw his replication, and set his cause down for hearing upon bill and answer.¹

Court for leave to do so is necessary, he should not file a replication, but should obtain an order to extend the time for filing the replication, until after the decision of the Court upon the application to amend. *Vermilyea v. Odell*, 4 Paige, 122. If the plaintiff files a replication to the answer after he is apprized of the necessity of an amendment of his bill, he precludes himself from making such amendment. *Ib.*

¹ *Rogers v. Grové*, 17 Ves. 130; *Brown v. Ricketts*, 2 John. Ch. 425.

CHAPTER XXI.

OF EVIDENCE.

PART I.—OF THE MATTERS TO BE PROVED.

SECTION I.—*Of Admissions.*

THE cause being at issue, by the filing of the replication, the next step to be taken by the plaintiff is, to prepare his proofs. The defendant also if he has any case to establish in opposition to that made by the plaintiff, must, in like manner, prepare to substantiate it by evidence.¹

In order to this, the first consideration with both parties must be the question, what is necessary to be proved?—and, having decided upon that, they must then consider the manner in which the proof is to be effected. In the following Chapter, therefore, a few pages will be devoted to a brief consideration of the matters necessary to be proved, both on the part of the plaintiff and of the defendant.

With respect to this point, it may be laid down as an indisputable proposition, that whatever is necessary to support the case of the

¹ In New Hampshire the rules in Chancery provide for the trial of the cause on depositions. “The plaintiff’s depositions in chief shall be taken within two months from the expiration of the time allowed for the delivery of the replication, and the defendant’s depositions in chief within three months from the same time, unless further time shall be allowed by the Court, or by a Justice on petition and notice to the other party.” Rule 23, of Chancery Practice. “Rebutting evidence may be taken by either party, within one month after the expiration of the time allowed for taking the depositions in chief of the defendant. Special orders may be made by the Court or by a Justice, upon petition and due notice, enlarging or reducing the time of taking testimony of either or both the parties.” Rule 24, 38 New Hamp. 609, 610.

In Maine, “all testimony is to be taken in writing, by virtue of a commission issued on interrogatories filed with the clerk,” &c. The formalities to be observed in taking, filing, abstracting, and producing the evidence are minutely pointed out in Rules 13, 14, 15, 16, 17, 18, Chancery Rules, Maine, 37 Maine, 585, 586.

In Massachusetts, the evidence in proceedings in Equity is required to be taken in the same manner as in suits at Law, unless the Court for special reasons otherwise directs; but this does not prevent the use of affidavits where they have heretofore been allowed. Genl. Sts. c. 131, § 60.

plaintiff, so as to entitle him to a decree against the defendant, — or, in the case of a defendant, to support his own case, as made by his answer, against that of the plaintiff, — must be proved, unless it is admitted by the other party.

Our object at present, therefore, must be to consider what admissions by the parties will preclude the necessity of proofs.

Admissions are either, — I. Upon the Record ; or, II. By Agreement between the Parties.

I. Admissions on the Record may be : 1, *constructive*, *i. e.* those which are the necessary consequence of the form of pleading adopted ; or, 2, *actual*, *i. e.* those which are positively contained in the pleading.

1. With respect to *constructive* admissions, the most ordinary instance of them is, where a plea has been put in by a defendant either to the whole or part of the bill ; in that case, as we have seen, the bill, or that part of it which is pleaded to, so far as it is not controverted by the plea, is admitted to be true.¹ A plaintiff, therefore, where he has replied to a plea, may rest satisfied with that admission, and need not go into evidence as to that part of his case which the plea is intended to cover,² unless the plea is a negative plea, in which case it will be necessary for him to prove the matter negatived, for the purpose disproving the plea, in the same manner as he may enter into evidence for the purpose of disproving matter which has been pleaded affirmatively.³

The facts alleged in a bill, where they are alleged positively, and not by way of pretence, are also constructive admissions, in favor of the defendant, of the facts so alleged, and, therefore, need not be proved by other evidence ; for, whether they be true or not, the plaintiff, by introducing them into his bill, and making them part of the record, precludes himself from afterwards disputing their truth.

It is to be observed, that there is a great difference between actual and constructive admissions, with respect to the manner in

¹ Gresley Eq. Ev. (Am. ed.) 9. As to implied admissions in answer, see post, 572, note.

² The plaintiff may, however, as we have seen, examine at large into his whole case. Ante, p. 718.

³ Ante, p. 718.

which they are presented to the Court : the former are read to the Court to substantiate the case of the party reading them, in the same manner as the other proofs in the cause ; the latter are presented to the Court, at the outset of the hearing, by the counsel opening the pleadings, for the purpose of showing what the matters in issue between the parties are.

2. *Actual* admissions on the record are those which appear either in the bill or in the answer.

The plaintiff, of course, cannot read any part of his own bill as evidence in support of his case, unless where it is corroborated by the answer ;¹ as where the bill states a deed or a will, and the defendant, in his answer, admits the deed or will to have been properly executed, and to be to the tenor and effect set forth in the bill ; in such case, the plaintiff, having read the admission from the answer, may read his bill, to show the extent of the admission made by the defendant. In strictness, however, this can hardly be called reading the bill on the part of the plaintiff, since the reading is only allowed because the defendant, by admitting the statement to be true as set forth in the bill, has, to that extent, made that portion of the bill a part of his answer.

In general, where a defendant refers to a document *for greater certainty*, he has a right to insist upon the document itself being read ;² but the plaintiff need not, on that ground, reply to the answer, but may set the cause down for hearing on bill and answer, and obtain an order to prove the document *vivâ voce* or affidavit at the hearing,³ provided it be such a document as, by the rules of the Court hereafter to be noticed, can be read in that manner.

We have seen before, that, in certain cases, viz. where a bill has been taken *pro confesso* under the stat. 1 Will. IV. c. 36, it may be read in evidence against the defendant, against whom it has been so taken *pro confesso*.⁴

With respect to the right of a defendant to make use of the plaintiff's bill as an admission of the facts therein stated, it is to be

¹ The answer of a party in Chancery is proper evidence against him, and so much of the bill as is necessary to explain the answer. *McGowen v. Young*, 2 Stewart, 276.

² *Cox v. Allingham*, Jac. 337.

³ *Fielder v. Cage*, Prac. Reg. 219.

⁴ Ante, p. 454.

observed, that, at Common Law, the general rule is, that a bill in Chancery will not be evidence, except to show that such a bill did exist and that certain facts were in issue between the parties, in order to introduce the answer or the depositions of witnesses, and that it cannot be admitted as evidence to prove any facts either alleged or denied in the bill.¹ In Courts of Equity, however, a different rule prevails, and the bill may be read as evidence, for the defendant, of any of the matters therein positively averred.²

With respect to admissions made by the answer of a defendant,³ it is to be observed, that, although a plaintiff by his replication denies the truth of the whole of the defendant's answer, he does not thereby preclude himself from reading whatever portion of it he thinks will support his case; except the answer be that of an in-

¹ 1 Phillips on Evid. 359; 1 Phil. Ev. (Cowen and Hill's ed. 1839,) 358, 359, note 640 in 2 ib.; Cowen and Hill's notes, 923, 924; Rankin v. Maxwell, 2 Marsh. Ken. 488, 489; Belden v. Davies, 2 Hall (N. Y.), 444; Owens v. Dawson, 1 Watts, 149, 150; Rees v. Lawless, 4 Litt. 218.

² Ives v. Medcalfe, 1 Atk. 63.

³ Where the bill charges a fact to be within the knowledge of the defendant, or which may fairly be presumed to be so, if the answer is silent as to the fact, it will be taken as admitted. It is otherwise, where the fact is not within the knowledge of the defendant, nor presumed to be so. Moore v. Lockett, 2 Bibb, 67, 69; Mitchell v. Maupin, 3 Monroe, 187; Hardy v. Heard, 15 Ark. 184; Booth v. Booth, 3 Litt. 57; Moseley v. Gassett, 1 J. J. Marsh. 212, 215; McCampbell v. Gill, 4 J. J. Marsh. 87, 90; Kennedy v. Meredith, 3 Bibb, 466; Pierson v. Meaux, 3 A. K. Marsh. 6; Wilson v. Carver, 4 Hayw. 92; Neal v. Hagthorp, 3 Bland, 551; Bank of Mobile v. Planters' & Merchants' Bank, 8 Alabama, 772. But see Gamble v. Johnson, 9 Missouri, 605; De Wolf v. Long, 2 Gilman, 679. By Rule 8, Chancery Practice in New Hampshire, "all facts well alleged in the bill, and not denied or explained in the answer, will be held to be admitted." Where a fact is admitted by the answer, the defendant cannot question or deny it by the proofs. Lippencott v. Ridgway, 3 Stockt. (N. J.) 526. The answer of a defendant in Chancery, being a confession, is always evidence against him, when pertinent, whoever may have been the parties in the cause in which it was interposed. Kiddie v. Debrutz, 1 Hayw. 420; Mims v. Mims, 3 J. J. Marsh. 103, 109, 110; Roberts v. Tennell, 3 Monroe, 247, 249; Hunter v. Jones, 6 Rand. 541; 1 Phil. Ev. (Cowen and Hill's ed. 1839,) 359, note 642, in 2 ib. Cowen and Hill's notes, 926. An answer, admitting the correctness of a copy of a deed made by another person, and to which there was no subscribing witness, is evidence, both of the contents and of the execution of the deed, against the person making such admission. Adams v. Shelby, 10 Alabama, 478. See Clark v. Spears, 7 Blackf. 96. The answer, not under oath, may, in relation to its admissions, be used against the defendant as if it were under oath. Smith v. Potter, 3 Wis. 432. And the plaintiff may avail himself of such admissions without thereby making the denials evidence for the defendant. Ib.

fant, which, as we have seen, can never be read to establish a fact which it is against the infant's interest to admit.¹ It may be observed, however, that although the answer of an infant cannot be read against him, the answer of the person under whom he derives title may; and therefore it has been held, that if, in a suit to establish a will against the heir, the heir puts in his answer admitting the will, and dies before the hearing, the derivative heir, though an infant, will be bound by the admission, and that the will need not be proved.² Of course, if an infant heir is bound by the admission of his ancestor, such an admission will be equally binding upon an adult.

It must not, however, be supposed that, in permitting a plaintiff to read a portion only of the defendant's answer in support of his case, a Court of Equity will allow a plaintiff to read a passage from a defendant's answer, for the purpose of fixing a defendant with an admission, without reading the explanations and qualifications by which the admission may be accompanied, even though such explanations and qualifications be contained in a distinct passage from that offered to be read.

The rule is, "that where a plaintiff chooses to read a passage from a defendant's answer, he reads all the circumstances stated in the passage. If the passage so read contains a reference to any other passage, that other passage must be read also."³ But it is to be observed, that although a defendant has a right to insist that, where a plaintiff reads a passage from his answer, he shall read other passages in the answer which are connected in meaning with the first passage, whether such passages are connected in point of grammatical construction, or separated by passages relating to distinct subjects,⁴ the Court will not, where "a plaintiff reads a passage in a defendant's answer, as evidence of a particular fact, allow a defendant to read, as evidence, any subsequent mat-

¹ Ante, p. 164.

² *Robinson v. Cooper*, 4 Sim. 131; *Loch v. Foot*, ib. 132; ante, p. 163.

³ *Bartlett v. Gillard*, 3 Russ. 157; see also *Lord Ormond v. Hutchinson*, 13 Ves. 47, 53; 16 Ves. 94, S. C. See also *Bartlett v. Gillard*, 3 Russ. 156; *Rude v. Whitechurch*, 3 Sim. 562; *Nurse v. Bunn*, 5 Sim. 225; 1 Phil. Ev. (Cowen & Hill's ed. 1839,) 359, 360, note 643 in 2 ib. 926 to 928. If on exceptions being taken, a second answer is put in, the defendant may insist upon having that also read, to explain what he swore in his first answer. 1 Phil. Ev. 359, note 644, in 2 ib. 928.

⁴ *Rude v. Whitechurch*, 3 Sim. 562; *Nurse v. Bunn*, 5 Sim. 225.

ter, although it may be connected with the passage, which the plaintiff had read, by such words as 'but' or 'and,' unless the subsequent matter is explanatory of the passage read by the plaintiff."¹ It is also to be remarked, that even where a passage is allowed to be read as explanatory of a part previously read by the plaintiff, it is to be read only for the purpose of explanation so far as explanation may be necessary. If in the passage so read new facts and circumstances are introduced, in grammatical connection with that which must be read for the purpose of explaining the reference, the facts and circumstances so introduced are not to be considered as read.²

To this may be added, that where a plaintiff, in reading a passage from a defendant's answer, has been obliged to read an allegation which makes against his case, he will be permitted to read evidence to disprove such allegation.³

There was formerly a distinction between bills for relief and bills for discovery, in the right of the plaintiff to read the answer of the defendant, for it used to be the rule that where an answer to a bill of discovery only was used as evidence, the whole should be read, as at Law;⁴ but now the 42d Order of August, 1841, has directed "That where a defendant in Equity files a cross bill for discovery only against the plaintiff in Equity, the answer to such cross bill may be read and used by the party filing such cross bill, in the same manner and under the same restrictions as the answer to a bill praying relief may now be read and used."⁵

With respect to what will be considered as such an admission by an answer, as will dispense with the necessity of other proof, it

¹ Davis v. Spurling, 1 R. & M. 64, 68; and see Miller v. Gow, 1 Y. & C. 59; Connop v. Hayward, 1 Y. & C. 33.

² Bartlett v. Gillard, *ubi supra*. See 1 Phil. Ev. (Cowen & Hill's ed. 1839,) 359, note, 643 in 2 ib. 926, 927. Where an answer admits a fact and insists on a distinct fact by way of discharge or avoidance, the latter, even if part of the same transaction, must be proved by evidence *aliunde*. Parkes v. Gorton, 3 Rhode Isl. 27; Walker v. Berry, 8 Rich. (S. C.) 33; Cummins v. Cummins, 15 Ill. 33; Stevens v. Post, 1 Beasley (N. J.), 408, 410, 411; Hart v. Ten Eyck, 2 John. Ch. 62; Miller v. Wack, Saxt. (N. J.) 209; Beckwith v. Butler, 1 Wash. R. 224; Thompson v. Lamb, 7 Vesey, 587.

³ Price v. Lytton, 3 Russ. 206.

⁴ Lord Ormond v. Hutchinson, 13 Ves. 47; 16 Ves. 94, S. C.

⁵ As a defendant is now enabled to examine the plaintiff upon interrogatories without filing a cross bill, it may be doubted whether this order is any longer material.

may be stated, that besides those expressions which in words admit the fact alleged to be true, a statement by the defendant that "*he believes*," or that he has been "*informed and believes*," that such fact is true, will be sufficient, unless such statement is coupled by some clause to prevent its being considered as an admission. The rule in Equity being, *that what the defendant believes the Court will believe*.¹

A mere statement, however, in an answer, that a defendant has been informed that a fact is as stated, without an answer as to his belief concerning it, will not be such an admission as can be read as evidence of the fact.² Such an answer is, in effect, insufficient; and if the plaintiff, upon reading the pleadings, finds such a statement as to a fact, with respect to which it is important to have the defendant's belief, he should except to the answer for insufficiency. It is to be remarked, that although the Court will, in general, consider what the defendant "*believes*" to be true, as admitted by him, it will not treat the statement of an heir at law, that he believes a will to have been executed, as an admission of the will, but will require either a direct admission or proof of its execution, in the usual way.³

It has been before stated, that the answer of an infant being in fact the answer of his guardian, cannot be read against him.⁴ The answer, however, may, it seems, be read against the guardian; and in *Beasley v. Magrath*,⁵ the answer of an infant by his mother and guardian in another cause, was read against the mother in her own capacity. And it seems, that where a defendant, being an infant, answers by guardian, and at full age neither amends nor makes a new answer, as he may do, but prays a hearing of the cause *de novo*, his answer is evidence against him.⁶

But although the answer of an infant cannot be read against him, the rule is different with respect to the answer of a person of weak intellect, taken by guardian.⁷ The answer of an idiot or lunatic, put in by his committee, may also be read against him.

¹ *Potter v. Potter*, 1 Ves. 274; *Hill v. Binney*, 6 Ves. 738.

² 1 Phil. Ev. (Cowen & Hill's ed. 1839), 360, note.

³ *Potter v. Potter*, 1 Ves. 274. And it appears the same rule is true with respect to the admission of the validity of a will by defendants who are not heirs at law. *Davies v. Davies*, 3 De Gex and Sm. 698.

⁴ Ante, p. 160; *Gresley Eq. Ev.* (Am. ed.) 323.

⁵ 2 Sch. & Lef. 34.

⁶ *Hind*. 422.

⁷ Ante, p. 169.

For the rules of practice with regard to reading the answer of married persons, the reader is referred to a former portion of this Treatise.¹

It may be stated, as a general rule, that the answer of one defendant cannot be read for the purpose of affording evidence against another,² without notice to such other defendant of the plaintiff's intention to read it.³

In cases, however, where the right of the plaintiff as against one defendant is only prevented from being complete by some question between the plaintiff and a second defendant, the plaintiff has

¹ Ante, p. 142 *et seq.*

² *Jones v. Turberville*, 2 Ves. jr. 11; 4 Bro. C. C. 115, S. C.; 1 Greenl. Ev. § 178; *Jones v. Turberville*, 2 Sumner's Vesey, 11, note (b); 1 Phil. Ev. (Cowen & Hill's ed. 1839), 362, note 650, in 2 ib. 931; *Porter v. Bank of Rutland*, 19 Vermont, 410; *Blodget v. Hobart*, 18 Vermont, 414. It seems to be a well established general principle, that the answer of one defendant cannot be read in evidence against a co-defendant. *Judd v. Seaver*, 8 Paige, 548; *Hayward v. Carroll*, 4 Harr. & John. 518; *Singleton v. Gayle*, 8 Porter, 271; *Conner v. Chase*, 15 Vermont, 764; *Thomasson v. Tucker*, 2 Blackf. 172; *Moseley v. Armstrong*, 3 Monroe, 389; *Robinson v. Sampson*, 23 Maine, 388; *Webb v. Pell*, 3 Paige, 368; *Collier v. Chapman*, 2 Stew. 163; *Chambliss v. Smith*, 30 Ala. 366; *Graham v. Sublett*, 6 J. J. Marsh. 145; *M'Kim v. Thompson*, 1 Bland, 160; *Calwell v. Boyer*, 8 Gill & John. 136; *Dexter v. Arnold*, 3 Sumner, 152; *Felch v. Hooper*, 20 Maine, 159; *Clarke v. Van Reimsdyk*, 9 Cranch, 152, 156; *Leeds v. Mar. Ins. Co. of Alex.*, 2 Wheaton, 380, 383; *Dade v. Madison*, 5 Leigh, 401; *Daniel v. Boullard*, 2 Dana, 296; *Field v. Holland*, 6 Cranch, 8; *Fanning v. Pritchett*, 6 Monroe, 79, 80; *Roundlett v. Jordan*, 3 Greenl. 47; *Mills v. Gore*, 20 Pick. 34. The answer of one defendant is not evidence against the other defendant, though prior to the filing of the answer the former may have transferred to the latter all his interest in the subject-matter of the controversy. *Jones v. Hardesty*, 10 Gill & John. 404. See also *Haworth v. Bostock*, 4 Younge & Coll. 1; *Lewis v. Owen*, 1 Ired. Eq. 290; *Hoare v. Johnstone*, 2 Keen, 553; *Osborne v. U. States Bank*, 9 Wheat. 738. But the answer of a defendant, which is responsive to the bill, is admissible as evidence *in favor* of a co-defendant, more especially where such co-defendant, being the depositary of a chattel claimed by the plaintiff, defends himself under the title of the other defendant. *Mills v. Gore*, 20 Pick. 28. But see *Morris v. Nixon*, 1 How. (U. S.) 118; *Cannon v. Norton*, 14 Vermont, 178. The deposition of a party in Chancery, read without objection, is evidence for his co-defendant. *Fletcher v. Wier*, 7 Dana, 354. See *Wolley v. Brownhill*, 13 Price, 500; S. C. 1 M'Lel. 317. If a defendant in his argument relies on the answer of his co-defendant, he thereby makes it evidence against himself. *Chase v. Manhardt*, 1 Bland, 336.

³ *Cousens v. Vasey*, 9 Hare, Appx. 61; and see *M'Intosh v. Great Western Railway Company*, 4 De G. & Sm. 544. The case of answers to a bill of interpleader affords an exception to this rule; *Lyne v. Pennell*, 1 Sim. N. S. 113.

always been permitted to read the answer of such second defendant for the purpose of completing his claim against the first;¹ and where several persons are mutually interested as partners, or jointly liable as the co-obligors of a bond, the declarations or answers of one have been admissible against the others.²

It is to be observed, that where an answer has been replied to generally, the rule was that in no case could it be read as evidence on the part of the defendant himself. We have, however, seen, that on a motion for a decree, the defendant's answer is treated as an affidavit, and there now seems no reason why such a rule should not be universal, as the defendant is now a competent witness for himself, and may certainly use an affidavit on his own behalf to the same effect as his answer. In disposing of the question of costs, the Court has always permitted the defendant's answer to be read in his own behalf.³ Moreover, the Court itself has al-

¹ *Green v. Pledger*, 3 Hare, 165; and generally, concerning the circumstances in which the Court will try and decide a case between co-defendants, see *Cottingham v. Lord Shrewsbury*, 3 Hare, 627; *Chamley v. Lord Dunsaney*, 2 Sch. & Lef. 690; *Farquharson v. Seton*, 5 Russ. 45; *Smith v. Baker*, 1 Y. & C. 228.

² *Crosse v. Bedingfield*, 12 Sim. 35. See 1 Greenl. Ev. § 178; *Clarke v. Van Reimsdyk*, 9 Cranch, 153, 156; *Williams v. Hodgson*, 2 Harr. & John. 474, 477; *Van Reimsdyk v. Kane*, 1 Gall. 630; *Hutchins v. Childless*, 4 Stew. & Port. 34; *Gilmore v. Patterson*, 36 Maine, 544; *Clayton v. Thompson*, 13 Geo. 291. Upon a bill in Equity by one partner against his copartners for an account, the answer of one of the defendants will not be evidence to charge another. *Chapin v. Colman*, 11 Pick. 331. But if it appears that the defendants, as constituting a partnership among themselves, of the one part, were in partnership with the plaintiff of the other part, the answer of one of the defendants would be evidence to charge the others. *Ib.* See also *Judd v. Seaver*, 8 Paige, 548; *Van Reimsdyk v. Kane*, 1 Gall. 630; *Winchester v. Jackson*, 3 Hayw. 310; *Rector v. Rector*, 3 Gilman, 105. The answer of a wife is not evidence against her husband. *The City Bank v. Bangs*, 3 Paige, 36. Nor is the answer of an obligee, evidence against his previous assignee, a party in the same suit. *Fanning v. Pritchett*, 6 Monroe, 79; *Turner v. Holman*, 5 Monroe, 411. Nor is the answer of a principal debtor, admitting his insolvency, evidence against his surety, a co-defendant, at the suit of a co-surety for contribution. *Daniel v. Bullard*, 2 Dana, 296. *A fortiori*, it follows that the mere silence of one defendant is no evidence against his co-defendant. *Timberlake v. Cobbs*, 2 J. J. Marsh. 136; *Blight v. Banks*, 6 Monroe, 192; *Harrison v. Johnson*, 3 Litt. 286.

The rule that the answer of one defendant cannot be read in evidence against his co-defendant, does not apply where the latter claims through him whose answer is offered in evidence. 1 Greenl. Ev. § 178. Nor where one defendant in his answer refers to the answer of his co-defendant. *Anon.* 1 P. Wms. 301; *Dunham v. Gates*, 3 Barb. Ch. 196; *Blakeney v. Ferguson*, 14 Ark. 641.

³ *Vancouver v. Bliss*, 11 Ves. 458; *Howell v. George*, 1 Mad. 1.

ways looked at the answer, not as evidence, but as what may regulate its discretion with respect to the further investigation of particular facts.¹

Although a defendant could not read his own answer as evidence for himself, as to any other point than that of costs, he was entitled to have the benefit by his answer, so far as it amounted to a denial of the plaintiff's case, unless the denial by the answer was contradicted by the evidence of more than one witness; the rule of Courts of Equity being, that where the defendant, in express terms negatives the allegations in the bill, and the evidence of one person only affirms what has been so negatived, then the Court will neither make a decree, nor send it to a trial at Law.²

¹ *Miller v. Gow*, 1 Y. & C. 59.

² *Pember v. Mathers*, 1 Bro. C. C. 52. See also *Kingdome v. Boakes*, Prec. in Ch. 19; *Wakelin v. Wathell*, 2 Ch. Ca. 8; *Earl of Arglasse v. Muschamp*, 1 Vern. 135; *Alam v. Jourdan*, ib. 161; *Christ's College, Cambridge, v. Widdrington*, 2 Vern. 283; *Hine v. Dodd*, 2 Atk. 276; *Glynn v. Bank of England*, 2 Ves. 38; *Mortimer v. Orchard*, 2 Ves. jr. 243; *Canons of St. Paul's v. Crickett*, ib. 563; *Lord Cranstown v. Johnston*, 3 Ves. 171; *Cooth v. Jackson*, 6 Ves. 40; *Evans v. Bicknell*, ib. 174; *Cooke v. Clayworth*, 18 Ves. 12. Where a replication is put in, and the parties proceed to a hearing, all the allegations of the answer which are responsive to the bill, shall be taken as true, unless they are disproved by evidence of greater weight than the testimony of a single witness. This may result from the testimony of two witnesses, or of one with corroborating circumstances; or from corroborating circumstances alone; or from documentary evidence alone. *Pierson v. Cutler*, 5 Vermont, 272; *Dunham v. Gates*, 1 Hoff. Ch. R. 188; *Hart v. Ten Eyck*, 2 John. Ch. 92; *Watkins v. Stockett*, 6 Harr. & John. 435; *Hughes v. Blake*, 6 Wheaton, 468; *Pierson v. Clayes*, 15 Vermont, 93; *Gould v. Williamson*, 21 Maine, 273; *Johnson v. Richardson*, 38 N. Hamp. 353; *Robinson v. Stewart*, 10 N. York (6 Selden), 189; *Miles v. Miles*, 32 N. Hamp. 147; *Camp v. Simon*, 34 Alabama, 126; *Davis v. Stevens*, 3 Clarke (Iowa), 158; *Panton v. Tefft*, 22 Ill. 366; *Pusey v. Wright*, 31 Penn. (State,) 387; *Spence v. Dodd*, 19 Ark. 166; *Hill v. Bush*, 19 Ark. 522; 1 Greenl. Ev. § 260; *Gresley Eq. Ev.* 4; *Clarke v. Van Reimsdyk*, 9 Cranch, 160; 2 Story Eq. Jur. § 1528; *Hollister v. Barkley*, 11 N. Hamp. 501; *Langdon v. Goddard*, 2 Story C. C. 267; *Roberts v. Salisbury*, 3 Gill & John. 425; *Purcell v. Purcell*, 4 Hen. & Munf. 607; *McCowen v. Young*, 2 Stew. & Port. 161; *Alexander v. Wallace*, 10 Yerger, 115; *Daniel v. Mitchell*, 1 Story C. C. 172; *Neville v. Demeritt*, 1 Green Ch. 322; *Betty v. Taylor*, 5 Dana, 598; *Gray v. Faris*, 7 Yerger, 155; *Johnson v. Slawson*, 1 Bailey Eq. 463; *Mason v. Peck*, 7 J. J. Marsh. 301; *Story Eq. Pl.* § 849 a, 875 a; *Stafford v. Bryan*, 1 Paige, 239; *Clark v. Oakley*, 4 Ark. 236; *Towne v. Smith*, 1 Wood. & Minot, 115; *Green v. Tanner*, 8 Metcalf, 422; *Cushing v. Smith*, 3 Story C. C. 556; *Hough v. Richardson*, 3 Story C. C. 659, 692; *Gould v. Gould*, 3 Story C. C. 516, 540; *Jones v. Belt*, 2 Gill, 106; *Menifee v. Menifee*, 3 English, 9; *Morgan v. Tifdon*, 3 McLean, 339;

The denial, however, by the answer, must in such cases be *positive*, otherwise the rule will not apply; as where a defendant, by

Appleton v. Horton, 25 Maine, 23; *Eastman v. McAlpice*, 1 Kelly, 157. The operation of the defendant's answer is the same, although the equity of the plaintiff's bill is grounded on the allegation of fraud. *Dilly v. Barnard*, 8 Gill & John. 171; *M'Donald v. M'Cleod*, 1 Ired. Eq. 226; *Lewis v. Owen*, 1 Ired. Eq. 290; *Murray v. Blatchford*, 1 Wendell, 583; *Cunningham v. Freeborn*, 3 Paige, 557; *Blanton v. Brackett*, 5 Coll. 232; *Green v. Vaughan*, 2 Blackf. 324; *Hart v. Ten Eyek*, 2 John. Ch. 92; *Wight v. Prescott*, 2 Barb. Ch. 196. The defendant is as much bound to answer the charging part as the stating part of the bill; and his answer to the charging part if responsive thereto, is evidence in his own favor, if an answer on oath has not been waived by the plaintiff. *Smith v. Clark*, 4 Paige, 368. Where, however, the answer of the defendant is not responsive to the bill, or sets up affirmative allegations, in opposition to, or in avoidance of, the plaintiff's demand, and is replied to, the answer is of no avail in respect to such allegations; and the defendant is as much bound to establish the allegations so made, by independent testimony, as the plaintiff is to sustain his bill. *Wakeman v. Grover*, 4 Paige, 23; *New England Bank v. Lewis*, 8 Pick. 113; *Hart v. Ten Eyek*, 2 John. Ch. 89; *Dickey v. Allen*, 1 Green Ch. 406; *O'Brien v. Ellioit*, 15 Maine, 125; *Lucas v. Bank of Darien*, 2 Stewart, 280; *Pierson v. Claves*, 15 Vermont, 93; *M'Daniel v. Barnam*, 5 Vermont, 279; *Tobin v. Walkinshaw*, 1 McAll. C. C. (Cal.) 26; *Pusey v. Wright*, 31 Penn. (State) 387; *Garlick v. McArthur*, 6 Wis. 450; *Ives v. Hazard*, 4 Rhode Is. 14; *Dease v. Moody*, 31 Miss. (2 George.) 617; *Fisler v. Poreh*, 2 Stockt. (N. J.) 243; *Miles v. Miles*, 32 New Hamp. 147; *Busby v. Littlefield*, 33 New Hamp. 76; *Rogers v. Mitchell*, 41 New Hamp. 157; *Leach v. Fobes*, 11 Gray, 509; *M'Donald v. McDonald*, 16 Vermont, 630; *Randall v. Phillips*, 3 Mason, 378; *Gordon v. Sims*, 2 M'Cord Ch. 156; *Clarke v. White*, 12 Peters, 178; *Lampton v. Lampton*, 6 Monroe, 620; *Purcell v. Pureell*, 4 Hen. & Munf. 511; *Hagthorp v. Hook*, 1 Gill & John. 272; *Alexander v. Wallace*, 10 Yerger, 105; *Carter v. Sleeper*, 5 Dana, 263; *Flagg v. Mann*, 2 Sumner, 487; *Cocke v. Trotter*, 10 Yerger, 213; *Gould v. Williamson*, 21 Maine, 273; *Story Eq. Pl. § 849 a*; *Jones v. Jones*, 1 Ired. Eq. 332; *Johnson v. Pierson*, Dev. Eq. 364; *Miller v. Wack*, 1 Saxton (N. J.), 204; *Pierce v. Gates*, 7 Blackford, 162; *Dunn v. Dunn*, 8 Alabama, 784; *Sanborn v. Kittredge*, 20 Vermont, 632; *Fitzhugh v. M'Pherson*, 3 Gill, 408; *Patton v. Ashley*, 3 English, 290; *Brooks v. Gillis*, 12 Smedes & Marsh. 538. The bill set out an agreement, and called upon the defendant to admit or deny it, but not to state what it was, and the defendant in his answer set forth another agreement, such statement of the latter agreement is not responsive to the bill, and is not evidence for the defendant. *Jones v. Beet*, 2 Gill, 106. But when the case is heard upon the bill and answer alone, the answer must be taken as true, whether responsive to the bill or not, because the defendant is precluded from proving it. *Lowry v. Armstrong*, 2 Stew. & Port. 297; *Cheny v. Belcher*, 5 Stew. & Port. 134; *M'Gowen v. Young*, 3 Stew. & Port. 161; *Paulling v. Sturgis*, 3 Stew. & Port. 95; *Doolittle v. Gooking*, 10 Vermont, 275; *Slason v. Wright*, 14 Vermont, 208; *Wright v. Bates*, 13 Vermont, 341; *Dale v. M'Evers*, 2 Cowen, 118; *Jones v. Mason*, 5 Rand. 577; *Kennedy v. Bayler*, 1 Wash. 162; *Copeland v. Crane*, 9 Pick. 73; *Russell v. Moffit*, 6

his answer, denies a fact as to his *belief* only; ¹ or where it is a mere constructive denial, by the filing of a traversing note.²

Howard (Miss.), 303; *DeWolf v. Long*, 2 Gilman, 679; *Rogers v. Mitchell*, 40 N. Hamp. 154. Still, general allegations in an answer, containing matters of belief and conclusions from facts not particularly stated, are said by Wilde, J. in *Copeland v. Crane*, 9 Pick. 73, 78, to be entitled to little or no weight in a hearing on the bill and answer. Such an answer, however, is sufficient to put the plaintiff to the proof of his case; the Court in such a case, will believe what the defendant believes, nothing being found to the contrary. *Buttrick v. Holden*, 13 Metcalf, 355, 357. And so far as his answer is a mere denial of the plaintiff's case, of course it prevails. It is for the plaintiff to prove the allegations in the bill which are denied by the answers. But when the answer admits the plaintiff's case, and seeks to avoid it, by general allegations of the character above alluded to by Mr. Justice Wilde, then the question of its effect, as an answer, properly arises, and undoubtedly, in such a case, it would be entitled to but little weight. See *Givens v. Tidmore*, 8 Alabama, 745. An answer, which alleges as facts what the defendant could not personally know, though responsive to the bill, merely puts the plaintiff upon the proof of his own allegations. *Dugan v. Gittings*, 3 Gill, 138. So of a denial by the defendant upon information and belief, not founded on the personal knowledge of the defendant. *Newman v. James*, 12 Alabama, 29. As to the effect of the answer of a corporation being put in, not under oath, but under the common seal of the corporation, see *Haight v. Proprietors of Morris Aqueduct*, 4 Wash. C. C. 601; *Angell & Ames Corp.* § 665; *Lovett v. Steam Saw Mill Ass.* 6 Paige, 54; *State Bank v. Edwards*, 20 Ala. 512; *Union Bank v. Geary*, 5 Peters, 99. Such answer has no other force and effect than that of an individual not under oath. *Maryland & New York Coal and Iron Co. v. Wingert*, 8 Gill, 170. As to the effect of an answer, made by one incompetent to give testimony in any case, and incapable of making oath, see *Salmon v. Clagett*, 3 Bland, 125.

Under the Practice Act in California a sworn answer is no evidence for the defendant. *Goodwin v. Hammond*, 13 Cal. 168. And in Missouri the old rule with respect to the weight of an answer in Chancery has been done away with by the new code. *Walton v. Walton*, 17 Miss. (1 Bennett,) 376.

¹ *Arnot v. Biscoe*, 1 Ves. 95; *Hughes v. Garner*, 2 Y. & C. 328, Exch. Rep. Where the answer does not state facts positively, or as within the defendant's own knowledge, or does state them inferentially merely, or only according to the defendant's best knowledge and belief, the rule requiring two witnesses, or one witness with corroborating circumstances to counteract its effect, does not apply. The only effect of the answer in such case is, to put the plaintiff to the necessity of proving the facts alleged in his bill. *Waters v. Creagh*, 4 Stew. & Port. 410; *Hughes v. Garner*, 2 Younge & Coll. 127; *Knickerbacker v. Harris*, 1 Paige, 209; *Stevens v. Post*, 1 Beasley (N. J.), 408; *Pearce v. Nix*, 34 Ala. 183; *Watson v. Palmer*, 5 Arkansas, 501, 505, 506; *Drury v. Conner*, 6 Har. & John. 288; *Phillips v. Richardson*, 4 J. J. Marsh. 213; *Copeland v. Crane*, 9 Pick. 73, 78; *Parkman v. Welch*, 19 Pick. 231; *Norwood v. Norwood*, 2 Harr. & John. 328; Pen-

² See ante, p. 496.

The reason for the adoption of this rule, by the Courts, was, because there being a single deposition only, against the oath of the defendant in his answer, the denial of facts by the answer is equally strong with the affirmation of them by the deposition; where, therefore, there are any corroborating circumstances in favor of the plaintiff's case, which give a preponderance in his favor, the Court will depart from the rule, and either make a decree, or direct an issue.¹

nington v. Gittings, 2 Gill & John. 208; *Hunt v. Rousmanier*, 3 Mason, 294; *Brown v. Brown*, 10 Yerger, 84; *Combs v. Buswell*, 2 Dana, 474; *Young v. Hopkins*, 6 Monroe, 22; *Martin v. Greene*, 10 Missouri, 652. The same is true where the answer is evasive, or so expressed as not to amount to a positive denial. *Wilkins v. Woodfin*, 5 Munf. 183; *McCampbell v. Gill*, 4 Monroe, 90; *Sallee v. Duncan*, 7 Monroe, 383; *Hutchinson v. Sinclair*, 7 Monroe, 293; *Neal v. Ogden*, 5 Monroe, 362; *Lyon v. Hunt*, 11 Ala. 295; *Martin v. Greene*, 10 Missouri, 652. So where the answer is merely formal to put in issue the allegations of the bill. *Reynolds v. Pharr*, 9 Ala. 560. The answer of a corporation, being put in under its common seal only, cannot be used as evidence, but puts in issue the allegations to which it responds, and imposes on the plaintiff the burden of proving such allegation. *Baltimore & Ohio R. R. v. Wheeling*, 13 Grattan (Va.), 40. Where an answer *on oath* is waived, the answer is not evidence in favor of the defendant for any purpose. *Patterson v. Gaines*, 6 How. U. S. 550; *Larsh v. Brown*, 3 Ind. 234; *Moore v. McClintock*, 6 Ind. 209; *Doon v. Bayer*, 16 Maryland, 144; although in fact put in under oath; *Gerrish v. Towne*, 3 Gray, 82; *Armstrong v. Scott*, 3 Iowa, 433; but as a pleading, the plaintiff may avail himself of the admissions and allegations contained therein, which establish the case made by the bill. *Bartlett v. Gale*, 4 Paige, 503; *Miller v. Avery*, 2 Barb. Ch. 582; *Wilson v. Towle*, 36 N. Hamp. 129; *Durfee v. McClurg*, 6 Mich. 223; *Smith v. Potter*, 3 Wis. 432. See also *Union Bank of Georgetown v. Geary*, 5 Peters, 99, 110—112; *Story Eq. Pl. § 875 a*, and note. It seems to be doubted by Mr. Justice Story, whether the plaintiff should have the power to deprive the defendant of the effect of his answer by dispensing with the oath, and at the same time use the answer for the benefit of his own case. *Story Eq. Pl. § 875 a*. See also as to the effect of the answer of an infant, who is not compellable to make answer under oath, *Bulkley v. V. Van Wyck*, 5 Paige, 536.

¹ *Pember v. Mathers*, 1 Bro. C. C. 53; *Walton v. Hobbs*, 2 Atk. 19; *Janson v. Rarey*, Ib. 140; *Dunn v. Graham*, 17 Ark. 60; 1 Greenl. Ev. § 260; 1 Phil. Ev. (Cowen & Hill's ed.) 154, 155, and notes referred to; *Sturtevant v. Waterbury*, 1 Edw. Ch. 442; *Columbia Bank v. Black*, 2 M'Cord Ch. 344, 350; *Smith v. Shane*, 1 M'Lean, 27; *Clark v. Van Reimsdyk*, 9 Cranch, 160; *Neilson v. Dickinson*, 1 Desaus. 133; *Union Bank of Georgetown v. Geary*, 5 Peters, 99; *Clark v. Hunt*, 3 J. J. Marsh. 560; *Young v. Hopkins*, 6 Monroe, 22; *Watkins v. Stockett*, 6 Harr. & John. 435; *Roberts v. Salisbury*, 3 Gill & John. 425; *McNeil v. Magee*, 5 Mason, 244; *Pierson v. Catlin*, 3 Vermont, 272; *Dunham v. Jackson*, 6 Wendell, 72; *Turner v. Holman*, 5 Monroe, 410; *Hutchinson v. Sinclair*, 7 Monroe, 294; *Drury v. Connor*, 6 Harr. & John. 288; *Wilkins v. Woodfin*, 5

The defendant is now, as we have seen, enabled to obtain the benefit of his own testimony, and the Court will probably not be bound by any previous decisions in balancing his testimony against that of a witness.¹

It may be observed, however, on this subject, that where a parol agreement, with part performance, has been insisted upon in a bill, and the agreement denied by the answer, yet if it were proved by one witness, and supported by circumstances of part performance, such as delivery of possession, the specific performance of the agreement would have been decreed.² Even in such cases, if the defendant, by his answer, denied the agreement set up by the bill, and his denial was confirmed by circumstances, the Court would not decree a specific performance, although the case made by the bill was corroborated by one witness.³ And where a particular agreement by parol (viz. an agreement to grant a lease for three lives) was stated in the bill and proved by one witness and confirmed by acts of part performance, but the answer admitted an agreement for one life only, and was supported by the testimony of one witness, the Court refused to decree for the plaintiff, the evidence of part performance being equally applicable to either agreement.⁴

Sometimes the Court has given the defendant an opportunity of trying the case at Law, when the plaintiff's case has been supported. *Munf.* 183; *Love v. Braxton*, 5 Call, 527; *Vance v. Vance*, 5 Monroe, 523; *Cunningham v. Freeborn*, 3 Paige, 557; *Estep v. Watkins*, 1 Bland, 488. The answer that denies, may contain the circumstances to corroborate the plaintiff's proof, so as to overcome itself, when taken in connection with that proof. *Pier-son v. Catlin*, 3 Vermont, 272; *Maury v. Lewis*, 10 Yerger, 115. Circumstances alone, in the absence of a positive witness, may be sufficient to overcome the denial of the answer, even of a person who answers on his own knowledge. *Long v. White*, 5 J. J. Marsh. 238; *Robinson v. Stewart*, 10 N. Y. (6 Selden,) 189; *Robinson v. Hardin*, 26 Georgia, 344; *Roberts v. Kelly*, 2 P. & H. 390. See also *Sturtevant v. Waterbury*, 1 Ed. 442; *Brown v. Brown*, 10 Yerger, 84; *Dunham v. Gates*, 1 Hoff. Ch. R. 188; *Cunningham v. Freeborn*, 3 Paige, 564; *S. C.* on appeal, 11 Wend. 251; *Gould v. Williamson*, 21 Maine, 276.

¹ In Missouri, the old rule in regard to the weight of an answer in Chancery is done away with by the new code. If the defendant sets up new matter in his answer, the burden of proof is on him. *Walton v. Walton*, 17 Mis. (2 Bennett,) 376.

² *Morphett v. Jones*, 1 Swanst. 172.

³ *Pilling v. Armitage*, 12 Ves. 78; and see *Money v. Jordan*, 2 Mac. & Gor. 318.

⁴ *Lindsay v. Lynch*, 2 Sch. & Lef. 1.

ported by the evidence of only one witness and corroborating circumstances,¹ and sometimes the Court has directed the answer of the defendant to be read as evidence.²

As the practice of directing an issue in a case of this description is one intended entirely for the satisfaction of the defendant, it is by no means compulsory upon the defendant to take one; and if the defendant declines an issue, the Court itself is bound to give judgment upon the question, whether the circumstances outweigh the effect of the rule, so as to authorize a decree against the denial in the answer.³

II. Admissions by agreement between the parties are those which, for the sake of saving expense or preventing delay, the parties, or their solicitors, agree upon between themselves.⁴

With respect to admissions of this description, as they must depend entirely upon the circumstances of each case, little can now be said respecting them, beyond drawing to the practitioner's notice the necessity there exists that they should be clear and distinct. In general they ought to be in writing, and signed either by the parties or their solicitors; the signature of the solicitor employed by the party being considered sufficient to bind his principal, the Court inferring that he had authority for that purpose.⁵

¹ *East India Company v. Donald*, 9 Ves. 275; *Ibbotson v. Rhodes*, 1 Eq. Ca. Ab. 229, pl. 13; 2 Vern. 554, S. C.; *Pember v. Mathers*, 1 Bro. C. C. 52; *Savage v. Brocksopp*, 18 Ves. 335 - 337; post, "Feigned Issues." See *Lancaster v. Ward*, 4 Overton, 430; *Smith v. Betty*, 11 Grattan (Va.), 752.

² The answer cannot be read unless an order is made to that effect. *Black v. Lamb*, 1 Beasley (N. J.), 108; *Gresley Eq. Ev.* 227. See Rule 33, of the Rules of Practice in Chancery in Massachusetts; *Gamble v. Johnson*, 9 Missouri, 605; *Kinsey v. Grimes*, 7 Blackf. 290. In *Marston v. Brackett*, 9 New Hampshire, 350, the Court remarked that "the manner of proceeding to the trial of issues from Chancery is under the control of the Court. Orders may be made respecting the admission of testimony, and an order may be made for the examination of one or both of the parties; but this may be refused. If the party, after the evidence has been taken for the hearing, moves for a trial by the jury, we are of opinion the case should be tried there upon the same evidence upon which it would have been tried had it taken the usual course of cases in Chancery, and been examined by the Court; unless the Court, upon cause shown, make an order permitting further evidence to be introduced. Any other course would lead to great abuse," &c.

³ *East India Company v. Donald*, *ubi supra*.

⁴ *Gresley Eq. Ev.* (Am. ed.) 38, *et seq.*

⁵ *Young v. Wright*, 1 Campb. N. P. 139; *Gainsford v. Gammer*, 2 Campb. N. P. 9; *Laing v. Raine*, 2 Bos. & P. 85.

It does not, however, appear to be necessary that an agreement to admit a particular fact should be in writing; and where, at Law, the plaintiff's attorney swore that he had proposed that the defendant should acknowledge a warrant of attorney, so as to enable the deponent, if it should become necessary, to enter up judgment thereon, and that the defendant had accepted his offer. It was considered well proved, that the defendant had agreed to acknowledge the instrument for all purposes, and that the plaintiff was at liberty to act upon the instrument without the necessity of producing the subscribing witness.¹

It is to be remarked, that although the Courts are disposed to give every encouragement to the practice of parties or their solicitors agreeing upon admissions among themselves, they will not sanction an agreement for an admission by which any of the known principles of Law are evaded; and, therefore, where a husband was willing that his wife should be examined as a witness in an action against him for a malicious prosecution, Lord Hardwicke refused to allow her examination, because it was against the policy of the Law to allow a woman to be a witness, either for or against her husband.² Upon the same principle, where the Law requires an instrument to be stamped, the Court will not give effect to an agreement between the solicitors to waive the objection arising from its not being stamped.³

SECTION II.

Of the Onus Probandi.

HAVING ascertained what matters are to be considered as admitted between the parties, either by the pleadings or by agreement, the next step is to consider what proofs are to be adduced in support of those points which are not so admitted; but before we proceed to the nature of those proofs, it will be right to devote a few

¹ Marshall v. Cliff, 4 Campb. N. P. 133.

² Barker v. Dixie, Rep. t. Hardwicke, 264. This practice may be altered since the recent changes in the law allowing husbands and wives to give evidence in their own cases; post, Pt. 3, § 1.

³ Owen v. Thomas, 3 M. & K. 353 - 357.

pages to the consideration of the subjects to which they ought to be applied.

In considering the question of what matters are to be proved in a cause, the first point to be ascertained is, upon whom the burden of the proof lies? And here it may be laid down, as a general proposition, that the point in issue is to be proved by the party who asserts the affirmative, according to the maxim of the Civil Law, — “*Ei incumbit probatio qui dicit, non qui negat.*”¹ This rule is common, as well to Courts of Equity as to Courts of Law, and, accordingly, when a defendant insists upon a purchase for a valuable consideration, without notice, the fact of the defendant, or those under whom he claims, having had notice of the plaintiff's title, must be proved by the plaintiff.² And, in general, it may be taken for granted, that wherever a *primâ facie* right is proved, or admitted by the pleadings, the *onus probandi* is always upon the person calling such right in question.³ And here it may be observed, that a Court will always treat a deed or instrument

¹ 1 Phillips on Evid. 194. This is a rule of convenience, adopted not because it is impossible to prove a negative, but because a negative does not admit of the direct and simple proof of which the affirmative is capable. 1 Greenl. Ev. § 74; Dranquet v. Prudhomme, 3 Louis. R. 83, 86. See 1 Stark. Ev. (5th Am. ed.) 362 to 365; 1 Phil. Ev. 194 to 200; 2 Phil. Ev. (Cowen & Hill's notes, ed. 1839) 475 *et seq.*; Phelps v. Hartwell, 1 Mass. 71; Blaney v. Sargeant, 1 Mass. 335; Loring v. Steinman, 1 Metcalf, 204, 211; Phillips v. Ford, 9 Pick. 39. Regard is to be had in this matter, to the substance of the issue rather than to the form of it; for in many cases the party, by making a slight change in his pleading, may give the issue a negative or affirmative form, at his pleasure. 1 Greenl. Ev. § 74. To this general rule, that the burden of proof is on the party holding the affirmative, there are some exceptions. 1 Greenl. Ev. § 78. One class of these exceptions will be found to include those cases in which the party grounds his right of action upon a negative allegation, and where of course the establishment of this negative is an essential element of his case. 1 Greenl. Ev. § 78; Lane v. Crombie, 12 Pick. 177; Kerr v. Freeman, 33 Miss. (4 George.) 292. So where the negative allegation involves a charge of criminal neglect of duty, whether official or otherwise; or fraud; or the wrongful violation of actual lawful possession of property, the party making the allegation must prove it. 1 Greenl. Ev. § 80.

There is no difference in respect to the burden of proof, between proceedings at Law and in Equity; in both the party maintaining the affirmative of the issue has it cast upon him. Pusey v. Wright, 31 Penn. (State) 387.

A party in Equity, pleading matter in avoidance, takes upon himself the burden of proof of the matter so pleaded. Peck v. Hunter, 7 Ind. 295.

² Eyre v. Dolphin, 2 Ball & B. 203; Saunders v. Leslie, 1b. 515; ante, p. 698; Field v. Sowle, 4 Russ. 112; and see Mawhood v. Milbanke, 15 Beav. 36.

³ Banbury Peerage, 1 S. & S. 156.

as being the thing which it purports to be, unless the contrary is shown; and, therefore, it is incumbent upon the party impeaching it, to show that the deed or instrument in question is not what it purports to be; therefore where a bond, which was upon the face of it a simple money bond, was impeached as being intended merely as an indemnity bond, it was held that the burden of proving it to be an indemnity bond, lay on the party impeaching it.¹ So, if a party claims two legacies under two different instruments, the burden of showing that he is only entitled to one will lie upon the person attempting to make out that proposition; for the Court will assume that the testator, having given the two legacies by different deeds, meant to do so, till the contrary is established.²

Indeed, in all cases where the presumption of Law is in favor of a party, it will be incumbent on the other party to disprove it, though in so doing he may have to prove a negative;³ therefore, where the question turns on the legitimacy of a child, if a legal marriage is proved, the legitimacy is presumed, and the party asserting the illegitimacy ought to prove it;⁴ for the presumption of Law is, that a child born of a married woman whose husband is within the four seas, is legitimate, unless there is irresistible evidence against the possibility of sexual intercourse having taken place.⁵

It is important, in this place, to notice that in cases where it is sought to impeach a will, or other instrument, on the ground of insanity, the rule as to the *onus probandi* is, that "where a party has been subject to a commission, or to any restraint permitted by

¹ Nicol v. Vaughan, 6 Bligh's N. R. 104; 1 Clark & Fin. 49.

² Hooley v. Hatton, 2 Dick. 461. Where two legacies are given to the same legatee, by the same instrument, the presumption is the other way. Ibid.

³ Whenever there is a presumption that a fact exists, he who makes an allegation to the contrary must prove it. Higdon v. Higdon, 6 J. J. Marsh. 51. Deeds are presumed to be delivered on the day of their date. An allegation of another day must be proved. Ib. On a plea of no consideration, the *onus* lies on the party pleading it. Ib.

⁴ 1 Phil. on Evid. 197; 1 Greenl. Ev. § 81. So where infancy is alleged. Ib. So in case a party once proved to be living is alleged to be dead, the presumption of life not yet being worn out by lapse of time; the burden of proof is on the party making the allegation, notwithstanding its negative character. Ib.

⁵ Head v. Head, 1 S. & S. 150; 1 Turn. & R. 138, S. C. See also Bury v. Phillpot, 2 M. & K. 349. As to other instances in which the presumption of law being in favor of the party, the Court will throw the *onus probandi* upon the opposite side; see 1 Phil. & Amos on Evid. 461.

law, even a domestic restraint, clearly and plainly imposed upon him in consequence of undisputed insanity, the proof showing sanity is thrown upon him, or upon them claiming under him.”¹ On the other hand, where insanity has not been imputed by relations and friends, or even by common fame, the proof of insanity, which does not appear to have ever existed, is thrown upon the party asserting it;² and it is not to be made out by rambling through the whole life of the individual, but must be applied to the particular date of the transaction.³

It has also been held, that where general lunacy has been established, and a party insists upon an act done during a lucid interval, the proof is thrown upon the party alleging the lucid interval; and that, in order to establish such an interval, he must prove something beyond a mere cessation of violent symptoms, viz. a restoration of mind to the party sufficient to enable him to judge soundly of the act.⁴

¹ Where one is under guardianship as *non compos*, the presumption is that he is incapable of making a will. *Breed v. Pratt*, 18 Pick. 115. Yet this does not prevent his making a will, if his mind is actually sound. *Ib.*; *Stone v. Damon*, 12 Mass. 488; 2 Greenl. Ev. § 690; *Crowningshield v. Crowningshield*, 2 Gray, 531. See *Stewart v. Lisperard*, 26 Wend. 255. The commission of suicide by the testator is not conclusive evidence of insanity. *Brooks v. Barrett*, 7 Pick. 94; *Duffield v. Robeson*, 2 Harring. 583. See 2 Greenl. Ev. § 689, 690.

² See 2 Greenl. Ev. § 689, 690; *Phelps v. Hartwell*, 1 Mass. 71; *Hubbard v. Hubbard*, 6 Mass. 397; *Breed v. Pratt*, 18 Pick. 115; *Rogers v. Thomas*, 1 B. Monroe, 394; *Morse v. Slason*, 13 Vermont, 296; *Jackson v. King*, 4 Cowen, 207; *Stevens v. Van Cleve*, 4 Wash. C. C. 262; *Burton v. Scott*, 3 Rand, 399; *Jackson v. Van Deusen*, 5 John. 144; *Hoge v. Fisher*, 1 Peters C. C. 163; *Pettes v. Bingham*, 10 N. Hamp. 514; *Gerrish v. Mason*, 22 Maine, 438; *Brooks v. Barrett*, 7 Pick. 94, 99; *Commonwealth v. Eddy*, 7 Gray, 583; *Baxter v. Abbott*, 7 Gray, 71. Under the statutes of Massachusetts, it has been held that the burden of proving the sanity of a testator is upon him who offers the will for probate. *Crowningshield v. Crowningshield*, 2 Gray, 524. See *Comstock v. Hadlyme*, 8 Conn. 261. But in the absence of evidence to the contrary the legal presumption is in favor of the sanity of the testator. *Baxter v. Abbott*, 7 Gray, 71. See the notes on this subject of presumption of sanity on proof of wills in 1 Jarman Wills (4th Am. ed.), 75 to 81. If it is alleged that the testator had no knowledge of the contents of the will he has executed, or that he was induced to execute it by misrepresentation, the burden of proof is on those who object to the will. *Pettes v. Bingham*, 10 N. Hamp. 514.

³ *White v. Wilson*, 13 Ves. 87, 88; and see *The Attorney-General v. Parnter*, 3 Bro. C. C. 441; *Price v. Berrington*, 3 Mac. & Gor. 486; *Jacobs v. Richards*, 18 Beav. 300.

⁴ *Hall v. Warren*, 9 Ves. 605, 611; *Clark v. Fisher*, 1 Paige, 171; *Halley v.*

It may also be stated, generally, that whenever a person obtains by voluntary donation a benefit from another, the onus of proof is upon him, if the transaction be questioned, to prove that the transaction was righteous,¹ and that the donor voluntarily and deliberately did the act, knowing its nature and effect. Moreover, where the relation of the parties is such that undue influence might have been used, the onus of proof is upon the person receiving the benefit to show that such influence was not exerted.²

SECTION III.

Confined to Matters in Issue.

It is a fundamental maxim, both in this Court and in Courts of Law, that no proof can be admitted of any matter which is not noticed in the pleadings;³ this maxim has been adopted in order to obviate the great inconvenience to which parties would be exposed, if they were liable to be affected by evidence at the hearing, of the intention to produce which they had received no notice. In a former part of this Treatise, the operation of this rule, in requiring

Webster, 21 Maine, 461; Boyd v. Eby, 8 Watts, 66; Jackson v. Van Dusen, 5 John. 144, 159; 2 Greenl. Ev. § 689; Goble v. Grant, 2 Green Ch. 629; White-nach v. Stryker, 1 Green Ch. 8; Duffield v. Robeson, 2 Harring. 375; Harden v. Hays, 9 Barr, 151; 1 Jarman Wills, (4th Am. ed.) 67 *et seq.*, and notes; Jeneks v. Probate Court, 2 Rhode Isl. 255.

The rule does not apply to a case of insanity caused by violent disease. Hix v. Whittemore, 4 Metcalf, 545; Townshend v. Townshend, 7 Gill, 10.

¹ Cooke v. Lamotte, 15 Beav. 234.

² Hoghton v. Hoghton, 15 Beav. 228.

³ Whaley v. Norton, 1 Vern. 483; Gordon v. Gordon, 3 Swanst. 472; Clarke v. Turton, 11 Ves. 240; Williams v. Llewellyn, 2 Y. & J. 68; Hall v. Maltby, 6 Pri. 240, 259; Montesquieu v. Sandys, 18 Ves. 302; Powys v. Mansfield, 6 Sim. 565. See Story Eq. Pl. § 257, 28; Langdon v. Goddard, 2 Story C. C. 267; James v. M'Kenin, 6 John. 543; Lyon v. Tallmadge, 14 John. 501; 1 Phil. Ev. (Cowen & Hill's ed. 1839,) 169 *et seq.* and notes; 2 Ib. (Cowen & Hill's notes,) 429 *et seq.* and cases cited; 1 Greenl. Ev. § 51 *et seq.*; Gresley Eq. Ev. 159 *et seq.*; Barque Chusan, 2 Story C. C. 456; Barrett v. Sargeant, 18 Vermont, 365; Pinson v. Williams, 23 Miss. (1 Cush.) 64; Kidd v. Manley, 28 Miss. (6 Cush.) 156; Surget v. Byers, 1 Hemp. 715; Craige v. Craige, 6 Ired. Eq. 191. Proofs taken in a cause must be pertinent to the issue in that cause, *secundum allegata*. Underhill v. Van Cortlandt, 2 John. Ch. 339.

the introduction into a bill of every fact which the plaintiff intends to prove, has been pointed out :¹ it has also been shown that the same rule applies to answers, and that a defendant cannot avail himself of any matter in his defence which is not stated in his answer, although it should appear in his evidence ;² little, therefore, remains to be noticed with reference to this part of the subject. It is, however, to be observed, that, in certain cases, evidence of particular facts may be given under general allegations, and that, in such cases, therefore, it is not necessary the particular facts intended to be proved should be stated in the pleadings.³ The cases in which this exception to the general rule is principally applicable are those where the character of an individual, or his general behavior, or quality of mind, comes in question ; as where, for example, it is alleged that a man is *non compos*, it is the experience of every day that you give particular acts of madness in evidence, and not general evidence only that he is insane.⁴ So where you charge that a man is addicted to drinking, and liable to be imposed upon, you are not confined, in general, to his being a drunkard, but particular instances are allowed to be given.⁵ In like manner, where the charge in a bill was, that the defendant was a lewd woman, evidence of particular acts of incontinence was allowed to be read.⁶ In cases of this nature, however, it is necessary, in order to entitle the party to read evidence of particular facts, that they should be pointed directly to the charge.

The cases in which evidence of particular facts may be given under a general allegation or charge, are not confined either to cases in which the character or quality of mind or general behavior of a party comes in issue ; the same thing may be done where the question of notice is raised in the pleadings by a general

¹ Ante, p. 335.

² Ante, pp. 725, 726 ; *Smith v. Clarke*, 12 Ves. 477. From the case of *The London and Birmingham Railway Co. v. Winter*, Cr. & Ph. 63, it seems that a fact brought to the attention of the Court by the evidence, but not stated upon the answer, will, under some circumstances, afford a ground for inquiry, before a final decree.

³ *Gresley Eq. Ev. (Am. ed.)* 161 *et seq.* ; *Story Eq. Pl.* § 28, 252.

⁴ *Clark v. Periam*, 2 Atk. 333, 340.

⁵ *Ibid.*

⁶ *Clark v. Periam*, 2 Atk. 333, 340. See also the cases there cited ; *Sidney v. Sidney*, 3 P. Wms. 269 ; *Lord Donerail v. Lady Donerail*, cited 2 Atk. 338 ; and see *Wheeler v. Trotter*, on the question how far particular acts of misconduct can be given in evidence under a general charge of misbehavior.

allegation or charge. Thus, where the defence was a purchase for a valuable consideration without notice of a particular deed ; but, in order to meet that case by anticipation, the bill had suggested that the defendant pretended that she was a purchaser for a valuable consideration without notice, and simply charged the contrary ; the deposition of a witness who proved a conversation to have taken place between himself and a third person, who was the solicitor of the defendant, and the consequent production of the deed, was allowed to be read as evidence of notice.¹

It is to be observed, that the question whether the party had notice or not, is a *fact* ; and that, the fact of the defendant having had notice having been put in issue, the mode in which the fact was to be proved was not important to be put upon the record ; for the rule that no evidence will be admitted, at the hearing of any facts, but those which are mentioned in the pleadings, requires that the facts only intended to be proved should be put in issue, and not the materials of which the proof of those facts is to consist.²

Thus, in a case of pedigree, if Robert Stiles be alleged to be the son of John Stiles, the fact to be proved is the relationship of Robert Stiles to John Stiles, and that may be done by any mode which the rules of evidence will allow, and it is not necessary to state that mode upon the record. It is upon this principle that documentary evidence, or letters themselves, are not specifically put in issue.³ In fact a party may prove his case, by written or *parol* evidence indifferently, and is under no more restrictions in the one case than in another. It is not necessary to put every written document in issue.⁴ Thus, where a bill charges an agreement for the purpose of establishing a lien, the general rule has been laid down that whatever would be evidence of the agreement at Law is evidence in Equity, subject to this, that if one party should keep back evidence which the other might explain, and thereby take him by surprise, the Court will give no effect to such evidence, without first giving the party to be affected by it an opportunity of controverting it.⁵

¹ Hughes v. Garner, 2 Y. & C. 328, Exch. R.

² Blacker v. Phepoe, 1 Moll. 355. See Story Eq. Pl. § 28, 252, 263, 265 a.

³ Blacker v. Phepoe, 1 Moll. 355.

⁴ Per Sir Anthony Hart, in Fitzgerald v. O'Flaherty, 1 Moll. 351. See also Lord Cranstown v. Johnston, 3 Ves. 176 ; Dey v. Dunham, 2 John. Ch. 188 ; Pardee v. De Cala, 7 Paige, 132 ; Kellogg v. Wood, 6 Paige, 578.

⁵ Malcolm v. Scott, 3 Hare, 63.

It is to be remarked, however, that, although letters and writings in the hands of a party may be proved and used as evidence of facts, they cannot be used as admissions or confessions of facts by the opposite party without being mentioned in the pleadings.¹ For it is a rule, that if a letter or writing amounts to a confession or an admission, it must be put in issue, in order that the party against whom it is to be read should have an opportunity to meet it by evidence or explanation.²

This rule, it is to be remarked, is not confined to writings, but applies in every case where the admission or confession of a party is to be made use of against him. Thus it has been held, that evidence of a confession by a party that he was guilty of a fraud, could not be read, because it was not distinctly put in issue.³ So, also, evidence of alleged conversations between a witness and a party to the suit, in which such party admitted that he had defrauded the other, was rejected, because such alleged conversations had not been noticed in the pleadings.⁴

It is to be observed, that it is only when conversations are to be used as admissions, that the rule, which requires them to be stated on the record, applies. Where the conversation is in itself the evidence of the fact, it need not be specially alluded to; as in the case of *Hughes v. Garner*,⁵ before referred to, where the notice was communicated to the defendant by a conversation, which was made use of to prove the fact of the conversation having taken place, and not as an admission by the party that he had received notice.

Another rule of evidence, which may be noticed in this place, is, *that the substance of the case made by the pleadings must be*

¹ *Houlditch v. Marquis of Donegal*, 1 Moll. 365; and see *Graham v. Oliver*, 3 Beav. 124; *Whitley v. Martin*, 3 Beav. 226.

² *Blacker v. Phepoe*, 1 Moll. 354.

³ *Hall v. Maltby*, 6 Pri. 240, 268; *Mulholland v. Hendrick*, 1 Moll. 359.

⁴ *Farrell v. —*, 1 Moll. 363; see, however, *M'Mahon v. Burchell*, 2 Phil. 127, in which Lord Cottenham would appear to have admitted such evidence. But it has been held in this country by Mr. Justice Story, upon full consideration, that the confessions, conversations, and admissions of the defendant need not be expressly charged in a bill in Equity, in order to enable the plaintiff to use them in proof of facts charged, and in issue therein. *Smith v. Burnham*, 2 Sumner, 612; *Jenkins v. Eldredge*, 3 Story C. C. 183, 283, 284. See Story Eq. Pl. § 265 a, and note; *Brown v. Chambers*, Hayes Exch. 597; *Malcolm v. Scott*, 3 Hare, 39, 63; *Brandon v. Cabiness*, 10 Alabama, 155.

⁵ 2 Y. & C. 328.

proved;¹ that is, all the facts alleged upon the pleadings which are necessary to the case of the party alleging them, and which are not the subject of admissions either in the pleadings or by agreement, must be established by evidence. Thus the plaintiff's title, as set out in the bill, must be proved, whether the statement of it in the bill was necessary or not.²

In the case of a plaintiff, however, it is sufficient to prove so much only of the allegations in the bill as are necessary to entitle him to a decree.³ Thus, where the suit is for an account, all the evidence necessary to be read at the hearing is, that which proves the defendant to be an accounting party, and then the decree to account follows of course; and any evidence as to the particular items of an account, however useful they may be in a subsequent stage of the cause, would be irrelevant at the original hearing.⁴

It may be noticed here, that sometimes, where, through inadvertence or negligence, the plaintiff has omitted to prove some particular fact which is necessary to support his case, the Court has permitted him to supply the defect by giving him leave to exhibit interrogatories⁵ to prove the fact omitted. This is frequently done in the case of wills disposing of real estates,⁶ where either the plaintiff has relied upon the admission of the will by answer, which

¹ 1 Phil. Ev. (Cowen & Hill's ed. 1839) 200 *et seq.* and notes; 1 Greenl. Ev. § 56 *et seq.*; Gresley Eq. Ev. (Amer. ed.) 167 *et seq.* The rule at law, that the evidence must substantially support the plaintiff's declaration, is applicable to bills in Chancery. *Moffet v. Claverts*, 1 Scam. 384; *Mansy v. Mason*, 8 Porter, 111; *Shelby v. Shelby*, 1 B. Monroe, 278; *Thompson v. Thompson*, 2 B. Monroe, 174; *Beers v. Botsford*, 13 Conn. 146.

² *Edney v. Jewell*, Mad. & Geld. 165; *Gresley Eq. Ev.* (Amer. ed.) 172.

³ *Gresley Eq. Ev.* (Amer. ed.) 167 to 169.

⁴ *Law v. Hunter*, 1 Russ. 101, 107; see, however, the observations of Sir J. Wigram, V. C., in the case of *Tomlin v. Tomlin*, 1 Hare, 245; *Forsyth v. Ellice*, 2 Mac. & Gor. 209. The Court should be satisfied that the plaintiff is entitled to have an account taken. If the Court is satisfied upon that point the practice is to refer the case to a Master to state the details of the account, and ascertain the balance. But the Chancellor may, if he sees fit, take the account himself. He not only may, however, but ought to refuse an account, if he is satisfied upon the evidence that nothing is due the plaintiff, or that for any cause an account ought not to be decreed. *Green C. J.* in *Campbell v. Campbell*, 4 Halst. Ch. (N. J.) 743.

⁵ Interrogatories are not used under the present practice, but probably an affidavit would now be allowed.

⁶ *Lechmere v. Brasier*, 2 Jac. & W. 288. See *Davies v. Davies*, 3 De Gex & Sm. 760.

the Court thinks not sufficiently full,¹ or where the absence or death of one of the witnesses to the will,² or the testator's sanity,³ has not been proved.⁴

In general, orders of this nature are made upon a simple application by counsel at the hearing of the cause. This, however, can only be done where the ground for making it appears satisfactory to the Court, and is not required to be established by other evidence. Where further evidence is required to enable the Court to make the order, application must be made either by petition,⁵ or by motion,⁶ supported by affidavit.

In some cases, the Court, instead of ordering the cause to stand over for the purpose of exhibiting interrogatories, has made a decree as to all that part of the case which is in a situation to be decided upon, and directed evidence to be adduced to prove the rest.⁷

Where, however, in a creditor's suit⁸ the plaintiff, having taken a bill *pro confesso* against one of the defendants, who was the executor, adduced no evidence of his debt as against the other defendants who were the devisees of the testator's real estate, and who did not sufficiently admit the debt, Lord Cottenham refused to allow the plaintiff at the hearing an opportunity of going into new evidence against the devisees, and dismissed the bill with costs as against them.

It may, however, be observed, that since the occurrence of these cases, a statutory power has been conferred upon the Court, of requiring the production of a witness for its own satisfaction, by the Chancery Amendment Act, sect. 39: "Upon the hearing of any cause depending in the said Court, whether commenced by bill or by claim, the Court, if it should see fit so to do, may require the production and oral examination before itself of any witness or

¹ *Potter v. Potter*, 1 Ves. 274; and see *Hood v. Pimm*, 4 Sim. 101.

² *Wood v. Stane*, 8 Pri. 613.

³ *Abrams v. Winshup*, 1 Russ. 526; *Wallis v. Hodgson*, ib. 527, n.; 2 Atk. 56, S. C.; and see *Ore v. Johnson*, Seton on Decrees, 363; *Moons v. De Bernales*, 1 Russ. 307; *Lechmere v. Brasier*, *ubi supra*; *Hodgson v. Merest*, 9 Pri. 563; *Cox v. Allingham*, Jac. 337.

⁴ See *Gresley Eq. Ev.* (Am. ed.) 132 to 138, where many instances are given of relief in cases of defects or omissions, whether they are brought to light and become material in consequence of something which arises unexpectedly in the course of the proceedings, or were caused by accident or inadvertence.

⁵ *Cox v. Allingham*, Jac. 337.

⁶ *Attorney-General v. Thurnall*, 2 Cox, 2.

⁷ *Lechmere v. Brasier*, *ubi supra*.

⁸ *Marten v. Wichelo*, Cr. & Ph. 251; see also *Hughes v. Eades*, 1 Hare, 486.

party in the cause, and may decree the costs of attending the production and examination of such witness or party, to be paid by such of the parties to the suit, or in such manner as it may think fit." And by sect. 41, "In cases in which it shall be necessary for any party to any cause depending in the said Court to go into evidence subsequently to the hearing of such cause, such evidence shall be taken, as nearly as may be, in the manner hercinbefore provided with reference to the taking of evidence with a view to such hearing."

SECTION IV.

Of the Effect of a Variance.

It is not only necessary that the substance of the case made by each party should be proved, but *it must be substantially the same case as that which he has stated upon the record*; ¹ for the Court will not allow a party to be taken by surprise by a case proved on the other side different from that set up by him in the pleadings. Thus the specific performance of an agreement to grant a lease for three lives cannot be decreed upon what amounts to evidence of an agreement to grant only for one life.² The principles which guide the Court in matters of this description are clearly stated by Lord Redesdale in his judgment in *Deniston v. Little*,³ from which it appears that the general practice of the Court is, to compel parties who come for the execution of agreements, to state them as they ought to be stated, and not to set up titles, which, when the cause comes to a hearing, they cannot support.

We have seen, in a former part of this Treatise, that, in bills

¹ *Gresley Eq. Ev.* (Am. ed.) 170 to 173; 1 *Greenl. Ev.* § 63 *et seq.*; 1 *Phil. Ev.* (Cowen & Hill's ed. 1839) 205 *et seq.* and notes; *Hobart v. Andrews*, 21 *Pick.* 526, 534; *Bellows v. Stone*, 14 *New Hamp.* 175; *Crothers v. Lee*, 29 *Ala.* 337; *Bowman v. O'Reilly*, 31 *Miss.* (2 *George*,) 261; *Reynolds v. Morris*, 7 *Ohio* (N. S.), 310; *Williams v. Starr*, 5 *Wis.* 534; *Gurney v. Ford*, 2 *Allen*, 576; *Andrews v. Farnham*, 2 *Stockt.* (N. J.) 91; *McWhorter v. McMahan*, 10 *Paige*, 386; *Sears v. Barnum*, 1 *Clark*, 139.

² *Lindsay v. Lynch*, 2 *Sch. & Lef.* 1. See also *Mortimer v. Orchard*, 2 *Ves.* jr. 243; *Legh v. Haverfield*, 5 *Ves.* 453; *Woollam v. Hearn*, 7 *Ves.* 222; *Deniston v. Little*, 2 *Sch. & Lef.* 11, n.; *Savage v. Carroll*, 2 *Ball & B.* 451; *Daniels v. Davison*, 16 *Ves.* 249; *Story Eq. Pl.* § 394, note; *Harris v. Knickerbocker*, 5 *Wendell*, 638.

³ *Ubi supra.*

where the rights asserted are founded in prescription, a considerable degree of certainty is required in setting out the plaintiff's case;¹ to this may be added, in this place, that, in general, the proof must correspond in certainty with the case so set out.²

We have seen before, that in some cases, where a plaintiff has alleged a different agreement in his bill, from that which has been admitted by the answer, the Court has permitted the plaintiff to amend his bill by abandoning the first agreement and insisting upon that stated upon the answer;³ and when the defendant sets up a parol variation from the written contract, it will depend on the particular circumstances of each case, whether that is to defeat the plaintiff's title to specific performance or whether the Court will perform the contract, taking care that the subject-matter of this parol agreement or understanding is carried into effect, so that all parties may have the benefit of what they contracted for.⁴ When, however, there is a material variance in a written agreement, it is the ordinary practice to dismiss the bill with costs, without prejudice to the plaintiff's bringing a new bill.⁵

It must be recollected that the Court has now, in this respect, larger powers to make a decree, according to the real merits of the case, than it formerly possessed.⁶

It may here be remarked generally, without any further statement of the general principles of evidence, that the rules upon this subject are the same in Equity as at Law, and that what the reader will find to be laid down in Treatises on Evidence as the rule in Courts of Law, will generally be applicable to cases in Courts of Equity.⁷

¹ *Scott v. Fenwick*, 3 Eagle & Y 1318; *Uhthoff v. Lord Huntingfield*, cited 1 Pri. 237; 2 Eagle & Y. 649, S. C.; *Prevost v. Benett*, 1 Pri. 236; 3 Eagle & Y. 705, S. C.; *Blake v. Veysie*, 3 Dow, 189; 2 Eagle & Y. 699; *Miller v. Jackson*, 1 Y. & J. 65.

² 1 Greenl. Ev. § 71, 72; 1 Phil. Ev. (Cowen & Hill's ed. 1839) 210 *et seq.* and notes.

³ Ante, p. 409; *Bellows v. Stone*, 14 N. Hamp. 175. Such amendment may be allowed even after a hearing upon bill, answer, and evidence. *Ib.*

⁴ *London and Birmingham R. R. Co. v. Winter*, Cr. & Ph. 62.

⁵ *Lindsay v. Lynch*, 2 Sch. & Lef. 1; *Woollam v. Hearn*, 7 Ves. 222; *Deniston v. Little*, 2 Sch. & Lef. 11, n.; See Story Eq. Pl. § 394, and note.

⁶ Ante, p. 405 *et seq.*

⁷ *Manning v. Lechmere*, 1 Atk. 453; *Glynn v. Bank of England*, 2 Vesey, 41; *Morrison v. Hart*, 2 Bibb, 5; *Lemaster v. Burckhart*, 2 Bibb, 28; *Dwight v. Pomeroy*, 17 Mass. 303; 1 Greenl. Ev. § 98 *et seq.*; *Gresley Eq. Ev.* (Amer. ed.) 218 *et seq.*

PART II. — OF DOCUMENTARY EVIDENCE.

SECTION I. — *Documentary Evidence — which proves itself.*

HAVING endeavored to direct the practitioner's attention to the matters which it will be necessary for him to establish by evidence in the cause, the next thing to be considered is the nature of the proofs by which such matters are to be substantiated. The subject was until recently one of great intricacy and importance, and to discuss it fully would have required a lengthy treatise. The whole law of evidence has, however, been completely changed in modern times, and a mass of refined distinctions, the growth of ages, almost entirely swept away. The rules upon the subject are now very few and simple, and it will be necessary to do little more than call the attention of the reader to the recent statutes and orders of the Court on the subject.

In so doing it will be the most convenient course to divide the subject of evidence into, I. Documentary or written evidence; and, II. Oral or unwritten evidence.

I. *Documentary or written evidence* consists of all those matters which are submitted to the Court in the shape of written documents. It is not of course intended to include in this definition the depositions of witnesses examined in the cause; for although, by the practice of Courts of Equity, the evidence to be derived from the parol examination of witnesses is set down in writing, and brought before the Court in that form, yet this does not vary the nature of the evidence itself, which, being spoken by the witness *vivâ voce* to the person by whom he was examined, does not, from the circumstance of its being by him committed to writing, for the more convenient use before the Judge, lose its parol character. Neither is it intended to include evidence by affidavit, which has recently been the most usual form in which witnesses tender their evidence. Such evidence is, in fact, a simple and easier mode by which the parol evidence of witnesses is communicated to the Court.

It is to be observed, that some descriptions of documentary evidence are admitted by the Court without the necessity of any proof

being gone into to establish their validity, whilst others require the support of parol testimony before they can be received.

In order, therefore, to the due consideration of the practice relating to documentary evidence, it seems right to treat, *first*, of documents which require no evidence to support them, or which, in other words, prove themselves; and *secondly*, of documents which require parol proof.

Amongst documentary evidence which proves itself may be ranked,

1. All printed copies of public Acts of Parliament, printed by the Queen's printer, whether in books or separate Acts, which are resorted to by Courts of Justice, not strictly as evidence, but as serving to refresh the memory,¹ with reference to which, it may be observed, that by the stat. 41 Geo. III. c. 90, s. 9, made for the better and more effectual proof of the Statute Law of this country in Ireland, and of the Irish Statute Law in Great Britain, it is enacted that copies of the statutes of Great Britain and Ireland before the Union shall be received as conclusive evidence of the several statutes in the Courts of either kingdom.²

2. Printed copies of Acts of Parliament, not public Acts, in which a special clause is inserted that they shall be printed by the Queen's printer, and that a copy so printed shall be admitted as evidence of the Act.³ When a private Act of Parliament, not

¹ Gib. on Evid. 8.

² 1 Greenl. Ev. § 480; *Young v. Bank of Alexandria*, 4 Cranch, 388; *Biddis v. James*, 6 Binney, 321, 326; *Gresley Eq. Ev. (Am. ed.)* 302 to 305; 1 Phil. Ev. (Cowen & Hill's ed. 1839) 317 *et seq.* It is not the duty of courts to take judicial notice of the execution of a public statute. *Canal Company v. Railroad Company*, 4 Gill & John. 7. As to the proof of foreign laws, of the laws of sister States, of the law of Congress in the State Courts, and of the laws of the States in the Courts of the United States, see 1 Greenl. Ev. § 486, 487, 488, 489, 490. In Massachusetts, printed copies of the Statute Laws of any other State, and of the United States, or of the territories thereof, if purporting to be published under the authority of the respective governments, or if commonly admitted and read as evidence in their Courts, shall be admitted in all Courts of Law, and on all other occasions, in that State, as *prima facie* evidence of such laws. Genl. Sts. c. 131, § 63.

For the mode of authenticating the records and judicial proceedings of one State to be used in the Courts of other States, see 1 Greenl. Ev. § 504 to 506.

³ See 1 Greenl. Ev. § 481. In Massachusetts, the printed copies of all statutes, acts, and resolves of the Commonwealth, whether of a public or a private nature, which shall be published under the authority of the government, shall be admitted as sufficient evidence thereof, in all Courts of Law, and on all occasions whatever. Genl. Sts. c. 131, § 62.

containing such a clause, is required in evidence, the regular proof is by an examined copy compared with the original, in the Parliament Office at Westminster.¹

3. Exemplified copies of records in other Courts of Justice, under the Great Seal of Great Britain, or under the seals of the Courts themselves;² The seal of the Queen, and of the superior Courts of Justice, and of the Courts established here by Acts of Parliament, are admitted in evidence without extrinsic proof of their genuineness;³ as, for example, the seal of the county palatine of Chester, or of the Ecclesiastical Court, on an exemplification of a will.⁴

And by the recent statute 14 & 15 Vict. c. 99, s. 7, "All proclamations, treaties, and other acts of state, of any foreign state or of any British colony; and all judgments, decrees, orders, and other judicial proceedings of any Court of Justice in any foreign state, or in any British colony; and all affidavits, pleadings, and other legal documents filed or deposited in any such Court, may be proved by examined copies, or by copies authenticated as thereinafter mentioned."⁵

That is to say, in the case of a proclamation, treaty, or other act of state, the authenticated copy must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs.

If the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any Foreign or Colonial Court, or an affidavit, pleading, or other legal document, filed or deposited in any such Court, the authenticated copy to be admissible as evidence must purport either to be sealed with the seal of the Foreign or Colonial Court to which the original document belongs; or in the event of such Court having no seal, to be signed by the Judge; or if there be more than one Judge, by any one of

¹ 1 Phil. & Amos, 611.

³ 1 Greenl. Ev. § 503.

² See 1 Greenl. Ev. § 501.

⁴ 1 Phil. & Amos, 613.

⁵ In Massachusetts, the unwritten or common law of any other of the United States, or of the territories thereof, may be proved as facts by parol evidence; and the books of reports of cases adjudged in their Courts may also be admitted as evidence of such law. Genl. Sts. c. 131, § 64. The existence, tenor, or effect, of all foreign laws, may be proved as facts, by parol evidence; but if it appears that the law in question is contained in a written statute or code, the Court may in its discretion reject any evidence of such law that is not accompanied by a copy thereof. *Ib.* § 65.

the Judges of the said Court ; and such Judge shall attach to his signature a statement in writing on the said copy, “ that the Court whereof he is a Judge has no seal.” And the same section further provides, “ That if any of the aforesaid authenticated copies shall purport to be sealed or signed as therein directed, the same shall respectively be admitted as evidence in every case in which the original document could have been received in evidence, without any proof of the seal, when a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.”¹

By the 8th section, apothecaries’ certificates are made admissible without proof of the common seal of the Society.

By the 9th section, documents made admissible without formal proof in England are rendered in a similar manner admissible in Ireland ; and by the following section, documents made admissible in Ireland are rendered equally admissible in England.

The 11th section extends these advantages to the Colonial Courts.

The 12th section applies to the register of British vessels, and enables registers of vessels and certificates of register, purporting to be duly signed, to be received in evidence as *prima facie* proof of all the matters contained or recited in such register, “ and of all the matters contained or recited in, or indorsed on such certificate of registry when the said certificate is produced.”

The 14th section is of general application, and is material. It is as follows : — “ Whenever any book or other document is of such a public nature as to be admissible in evidence, on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any Court of Justice, or before any person now or hereafter having by law, or by consent of parties, authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract ; or provided it purport to be signed and certified as a true copy or extract to any person by the officer to whose custody the original is entrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a

¹ See 1 Greenl. Ev. § 514.

reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of seventy words."

By the 16th section, "Every Court, Judge, Justice, officer, commissioner, arbitrator, or other person now or hereafter having by law, or by consent of parties, authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively."

Moreover, by the General Registry Act, 6 & 7 Will. IV. c. 8, s. 38, it is enacted, "That certified copies of entries, purporting to be sealed or stamped with the seal of the Register Office, shall be received as evidence of the birth, death, or marriage, to which the same relates, without any further or other proof of such entry, and that no certified copy, purporting to be given in the said office, shall be of any force or effect which is not sealed or stamped as aforesaid."¹

By the 14th section of 14 & 15 Vict. c. 94, the person signing the copy is the officer to whose custody the original is entrusted. Before this statute it was necessary that he should have been expressly authorized to make copies.²

In a case before the Lords Justices,³ it was held, that extracts from parish registers, signed by persons describing themselves in such signatures as "rectors" or "vicars," were sufficient within the 14th section, but not where the description was "incumbent" or "curate," as it might be a question whether such persons were the proper persons to have the custody of registers.

It is necessary here also to call attention to the 8 & 9 Vict. c. 113, by the 1st section of which it is enacted, "That whenever by any Act now in force or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any Court of Justice or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp

¹ 1 Greenl. Ev. § 483, 484, 485, 493.

² 1 Phil. & Amos, 315; 1 Greenl. Ev. § 485, 498, 507, 508.

³ *Re Neddy Hall's Estate*, 2 De G. Mac. & Gor. 748.

and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same."

The 2d section enacts, "That all Courts, Judges, Justices, Masters in Chancery, Masters of Courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the Equity or Common Law Judges of the Superior Courts at Westminster, provided such signature be attached or appended to any decree, order, certificate or other judicial or official document."

The 3d section enacts, "That all copies of private and local and personal Acts of Parliament, not public Acts, if purporting to be printed by the Queen's printer, and all copies of the Journals of either House of Parliament, and of Royal Proclamations, purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, shall be admitted as evidence thereof by all Courts, Judges, Justices and others, without any proof being given that such copies were so printed."¹

The method of proving depositions taken in one Court upon the hearing of a cause in another, is, by producing a certified copy of the bill and answer,² unless the depositions are so ancient that no bill and answer can be forthcoming,³ or unless the defendant has been in contempt or has had an opportunity of cross-examining, which he chose to forego, in which case the depositions may be read after proving the bill only.⁴ It is to be noticed, also, that depositions may be used as evidence against a party to the suit, or for the purpose of contradicting the witness, without proof of the bill and answer, although some proof of the identity of the person will be required.⁵

Where the depositions have been taken on interrogatories, under a commission issuing out of another Court, they are not admissible without the production of the commission, under the authority of which they were taken;⁶ unless the depositions are

¹ 1 Greenl. Ev. § 479, 482; ante, 859, notes.

² *Reeve v. Hodson*, 10 Hare, Appx. 19.

³ Phil. & Amos, 628.

⁴ Ibid.

⁵ Phil. & Amos, 628; 1 Greenl. Ev. § 156.

⁶ 1 Greenl. Ev. 517; *Rowe v. Brenton*, 8 B. & C. 737, 765.

of long standing, so that the commission may be presumed to have been lost, in which case they are evidence by themselves; but, in either case, whether the depositions are of a recent or ancient date, there is no occasion to produce the bill and answer.¹

4. It has been before stated, that the Court of Chancery pays attention to its own proceedings, although they are not actually recorded.² In illustration of which it may be stated, that all the proceedings of the Court which are required as evidence in the cause, may be used as such, without further testimony to establish them than the production of the proceeding itself, or of an office copy of it, signed by the officer in whose custody such proceeding properly is, according to the practice of the Court.

But although it is the general rule of the Court to pay attention to its own proceedings, it will not in all cases permit them to be read at the hearing of a cause, without an order specifically authorizing the party to read them. The cases in which the proceedings of the Court may be read without an order are confined to those in which they have taken place in the cause itself, and to acts of the Court, such as decrees or orders made in another cause, between the same parties.³

To entitle a party to read, at the hearing, the answers or depositions, or any other proceedings taken in *another* cause, an order is necessary, even though the suit be between the same parties.⁴ This distinction appears to have arisen from the former practice of the Court, which, in conformity with the practice of Courts of Law, required that when any proceedings in one cause were to be given in evidence in another, the foundation for the production of them should be laid by proving the bill and answer in the cause in which they were taken; gradually, however, this rule has been relaxed, and as the Court will now, as we shall hereafter see, in directing an issue to be tried at Law, order the depositions in the cause to be read at the trial of the issue, so as to dispense with the strict proof which would otherwise be required of the bill and answer,—so in the case of reading its own proceedings in another

¹ Phil. & Amos, 629.

² Ante, p. 710. The final decree of a Court of Equity may be given in evidence in another suit, although such decree has not been formally enrolled. *Bates v. Delavan*, 5 Paige, 299.

³ *Brooks v. Taylor*, Mos. 188.

⁴ Hand. 114. See 1 Phil. Ev. (Cowen & Hill's ed. 1839) 363, 364, note, 656 in 2 ib. 934; *Green v. Green*, 5 Ham. (Ohio,) 278.

suit, it will dispense with the necessity of laying the regular foundation for such proof by the production of the bill and answer, by making an order, that the party shall be at liberty, at the hearing, to read the depositions or other proceedings in the former cause: such an order is not necessary to entitle a party to read a decree or order, because, formerly, decrees and orders recited the pleadings upon which they were founded; and, even at Common Law, no further proof of them was required.¹

It is to be observed, that a decree or order of the Court of Chancery, determining a matter of right, is good evidence as to that right, not only against the party against whom the decree was made, but against all those claiming under him.² But although a decree between other parties cannot be read as evidence, yet it may be read as a precedent.³ And it is not in any case necessary, in order that it should be admissible as evidence, that the parties to it should have filled the relative situations of plaintiff and defendant; if the present plaintiff and the defendant were co-defendants in the former cause, the decree in that cause may be read, though not as conclusive evidence.⁴ “It frequently happens,” observes Lord Hardwicke, “that there are several defendants, all claiming against the plaintiff, and having also different rights and claims among one another: the Court then makes a decree settling the rights of all the parties; but a declaration for that purpose could not be made, if this objection (*viz.* to receiving the decree as evidence, because made between co-defendants) holds, which would be very fatal, as it would occasion the splitting one cause into several.”⁵

The depositions of witnesses, which have been taken in another cause between the same parties,⁶ may, as well as other proceedings

¹ Phil. & Amos, 619.

² *Borough v. Whichcote*, 3 Bro. P. C. 595. See 1 Greenl. Ev. § 522, 523, 536; 1 Phil. Ev. (Cowen & Hill's ed. 1839,) 358, note, 639 in 2 ib. 915 *et seq.* For the mode of proving decrees and answers in Chancery, see 1 Greenl. Ev. § 511, 512. A decree in Chancery, being the act of a Court of a sister State, must be authenticated according to the statute of the United States, 1790, May 26, 1 U. S. Stat. at Large, 122 (1 Greenl. Ev. § 504), to be admissible in evidence. *Barbour v. Watts*, 2 A. K. Marsh. 290.

³ *Austen v. Nicholas*, 7 Bro. P. C. 9.

⁴ *Poulterer's Company v. Askew*, 2 Ves. 89.

⁵ *Poulterer's Company v. Askew*, 2 Ves. 89. See also *Chamley v. Lord Dunsany*, 2 Sch. & Lef. 710; *Farquharson v. Seton*, 5 Russ. 45.

⁶ *Brooks v. Cannon*, 2 A. K. Marsh. 525.

in another cause, be read at the hearing by order. Thus evidence which has been taken in a cross cause may, by order, be read at the hearing of the original cause ;¹ and *vice versa*, provided the point in issue is the same in each case. Where the matter in issue is not the same, the depositions taken in one cause cannot be read in the other.

Moreover, in order to entitle a party to read the depositions taken in another cause, it is necessary that the person against whom they are offered in evidence, or the person under whom he claims, should have been a party to such other cause.² Where the person against whom the evidence was offered was neither a party to such other cause, nor privy to a person who was a party, the depositions taken in that cause cannot be read. Thus, where a father is tenant for life only, depositions taken in a cause to which he was a party cannot be read against his son who claims as tenant in tail.³

It appears, however, that when one legatee has brought his bill against an executor, and proves assets, and afterwards another legatee brings his bill, then the last-named legatee may have the benefit of the depositions in the former suit, though not a party to it. In fact, the suit is for the same object, and the plaintiff in the second suit stands in the same relation to the defendant as the plaintiff in the first suit.⁴

It seems not to be important what character the individual, against whom the depositions in the former suit are offered, filled in that suit, whether that of plaintiff or defendant, provided he had, in such character, an opportunity of cross-examining the witness. If he was a party to the first suit as a co-defendant, and be-

¹ *Lubiere v. Genou*, 2 Ves. 579; *Holcombe v. Holcombe*, 2 Stockt. Ch. (N. J.) 284.

² *Mackworth v. Penrose*, 1 Dick. 50; *Eade v. Lingood*, 1 Atk. 204; *Humphreys v. Pensam*, 1 M. & C. 580; *Gresley Eq. Ev.* (Am. ed.) 185, 186; 1 *Phil. Ev.* (Cowen & Hill's ed. 1839,) 364, and notes in 2 *ib.* 934, 935; *Harrington v. Harrington*, 2 Howard, 701; *Payne v. Coles*, 1 Munf. 373; *Dale v. Rosevelt*, 1 Paige, 36; *Roberts v. Anderson*, 3 John. Ch. 376.

³ *Peterborough v. Norfolk*, Prec. in Cha. 212; *Coke v. Fountain*, 1 Vern. 413; and see *Gilbert on Ev.* 28; *Bull. N. P.* 232; *Rushworth v. Countess of Pembroke*, Hardr. 472; for the reason, why a verdict is not evidence for or against a person who was not a party to it, see *Phil. & Amos*, 514.

⁴ *Coke v. Fountain*, 1 Vern. 413, and see *Lady Dartmouth v. Roberts*, 16 East, 336; *Travis v. Challenor*, 3 Gwill. 1237; *Ashby v. Power*, *ib.* 1239; *Benson v. Olive*, 2 Gwill. 701; *Earl of Sussex v. Temple*, 1 Lord Raym. 360.

comes a plaintiff in the second suit, making his co-defendant in the first suit a defendant, he may, if such co-defendant sets up the same defence that he did in the original suit, read the evidence taken in that suit against such co-defendant. Thus, in an old case, where the creditors of a testator filed their bill against the residuary legatees, and also against a purchaser from the testator, praying to have their debts paid, and the conveyances, alleged to have been executed by the testator to the purchaser, set aside for fraud, and obtained a decree accordingly; and afterwards the residuary legatees filed another bill against the purchaser, praying for an account of the residue and to set aside the conveyances, — upon the question arising, whether the depositions taken in the former cause as to the fraud, in obtaining the conveyances, could be read in the second cause, for the legatees against the purchasers, who were co-defendants in the former cause, it was held, that as there was the same question and the same defence in both the causes, the depositions ought to be read.¹

It may be stated here, that where the depositions of witnesses in another suit are offered to be read at the hearing against persons who were parties to such other suit, or those claiming under them, it does not appear to be necessary that the witnesses, whose depositions were offered to be read, should be proved to be dead. This appears to have been the effect of the determination of the House of Lords in the *City of London v. Perkins*,² and of Sir John Leach, V. C., in *Williams v. Broadhead*.³ In a subsequent case, however, (*Carrington v. Carnock*,⁴) Sir L. Shadwell seems to have entertained a different opinion from that expressed by Sir J. Leach, in *Williams v. Broadhead*; and it is to be remarked, that at Law, the depositions of a witness, taken in a suit in Chancery, cannot be read if the witness is alive, even though he is unable to attend by reason of sickness.⁵ It is, however, to be observed, that the personal examination in Court, to which a witness is subjected at Law, renders it much more important that he should be examined again, than it is in Equity, where the depositions until recently were taken in all cases in secret.

¹ *Nevil v. Johnson*, 2 Vern. 447; and see *Poulterers' Company v. Askew*, 2 Ves. 89, 90; *Phil. & Amos*, 575.

² 3 Bro. P. C. 602.

³ 1 Sim. 151.

⁴ 2 Sim. 567.

⁵ *Phil. & Amos on Evid.* 577; *Gresley Eq. Ev. (Am. ed.)* 186, 187.

Some doubt seems to have been, at one time, entertained whether the depositions of witnesses, taken in a cause where the bill had been subsequently dismissed, could be read at the hearing of another cause, and the rule appears to have been laid down, that if the dismissal was upon merits, yet evidence of the facts which have been proved in the cause may be used as evidence of the same facts in another cause between the same parties ;¹ but where a cause has been dismissed, not upon merits, but upon the ground of irregularity, (as, for instance, because it comes on by revivor, where it ought to have come on by original bill,) so that regularly there was no cause in Court, and consequently no proofs properly taken, such proofs cannot be used.² If, however, upon a bill to perpetuate testimony, the cause should be set down for hearing, and the bill dismissed because it ought not to have been set down, the plaintiff may, notwithstanding the dismissal, have the benefit of the depositions.³

An order for leave to read, at the hearing, the depositions or proceedings in another cause, is granted upon motion or petition at the Rolls without notice, and must be served upon the adverse party, who may, if there is any irregularity in it, or in the mode in which it has been obtained, apply by motion to discharge it. As, however, it is possible that the irregularity of such an order may not appear till it is acted upon at the hearing, when it would be too late to discharge it, the order is always made with a "*saving of just exceptions*,"⁴ the effect of which is to leave it open to the party against whom the evidence is offered, to make any objection to the reading of evidence under it which the nature of the case will admit, in the same manner that he might have done had no such order been made.

By the general Orders of the Court it is directed, that, where either party, plaintiff or defendant, obtains an order to use the depositions of witnesses taken in another cause, the adverse party may likewise use the same without further order, unless he be, upon special reason shown to the Court by the party first desiring the same, inhibited, *by the same order*, so to do.⁵

¹ *Lubiere v. Genou*, 2 Ves. 579.

² *Backhouse v. Middleton*, 1 Cha. Ca. 173-175; 3 Cha. Rep. 33; 9 Freem. 132; *Gresley Eq. Ev. (Am. ed.)* 187; *Hopkins v. Strump*, 2 Harr. & John. 301.

³ *Hall v. Hoddlesdon*, 2 P. Wms. 162. See also *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 316.

⁴ *Hand*. 114, 115.

⁵ *Beames's Ord.* 194.

Where it is necessary that records should be produced at any place out of the Court of Chancery, the Clerk of Records and Writs must attend with them, and the 5th Order of 1842 provides for the payment of his costs in such a case.¹

The documents which have been before enumerated as requiring no evidence to prove them, are all, either in a greater or less degree, public documents : private documents, which are thirty years old from the time of their date, also prove themselves.² This rule applies, generally, to deeds concerning lands, and to bonds, receipts, letters, and all other writings, the execution of which need not be proved ; provided they have been so acted upon, or brought from such a place, as to afford a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty.³ Lord Chief Baron Gilbert, however, upon this point, says, that “if possession hath not gone along with a deed, some account ought to be given of the deed, because the presumption fails, where there is no possession” ;⁴ and he adds a caution, that “if there is any blemish in an ancient deed, it ought to be regularly proved, or where it imports a fraud ; as where a man conveys a reversion to one, and afterwards conveys it to another.”⁵

The rule of computing the thirty years from the date of a deed is equally applicable to a will.⁶ Some doubt appears formerly to

¹ Attorney-General *v.* Ray, 6 Beav. 335.

² Phil. & Amos on Evid. 650.

³ Phil. & Amos on Evid. 652. See also, as to letters, *Fenwick v. Reed*, Mad. & Geld. 8.

⁴ Gilb. on Evid. 102 ; *Gresley Eq. Ev.* (Am. ed.) 124, 125 ; 1 Phil. Ev. (Cowen & Hill's ed. 1839,) 477, note, 903, in 2 ib. 1310 *et seq.* and cases cited ; 1 Greenl. Ev. § 21, 570, and cases cited ; *McKenire v. Fraser*, 9 Sumner's Vesey, 5, note (a). It is not necessary to call the subscribing witnesses, though they be living. *Jackson v. Christman*, 4 Wendell, 277, 282, 283 ; *Fetherly v. Waggoner*, 11 Wendell, 603 ; 1 Greenl. Ev. § 21, 570 ; *Jackson v. Blanshan*, 3 John. 292 ; *Winn v. Patterson*, 9 Peters, 674, 675 ; *Bennet v. Runyon*, 4 Dana, 422, 424 ; *Cook v. Torton*, 6 Dana, 110 ; *Thurston v. Masterton*, 9 Dana, 233 ; *Hinde v. Vattier*, 1 M'Lean, 115 ; *Northop v. Wright*, 24 Wendell, 221 ; 1 Phil. Ev. (Cowen & Hill's ed. 1839,) 478.

⁵ Gilb on Evid. 102 ; 1 Phil. Ev. (Cowen & Hill's ed. 1839,) 478, note, 906, in 3 ib. 1317, 1318 ; 1 Greenl. Ev. § 21, 570 ; *Gresley Eq. Ev.* (Am. ed.) 124, 125.

⁶ *Man v. Ricketts*, 7 Beav. 93 ; *Doe v. Burdett*, 4 Ad. & E. 1.

have been entertained on this point, on the ground that deeds take effect from their execution, but wills from the death of the testator.¹ In *Raneliff v. Parkins*,² Lord Eldon observes, “that, in a Court of Law, a will thirty years old, if possession has gone under it, and sometimes without possession (but always with possession), if the signing be sufficiently recorded, proves itself; but if the signing be not sufficiently recorded, it would be a question, whether the age proves its validity; and then possession under the will, and claiming and dealing with the property as if it had passed under the will, are cogent reasons for proving the due signing of the will, though it be not recorded.”³

It appears to be doubted, whether the seal of a Court or corporation is within the rule as to thirty years; and in *Rex v. The Inhabitants of Barthwick*,⁴ Lord Tenterden said, “that it might be argued that it was not within the principle of the rule, because, although the witnesses to a private deed, or persons acquainted with a private seal, may be supposed to be dead, or not capable of being accounted for, after such a lapse of time; yet the seals of Courts and of corporations, being of a permanent character, may be proved by persons at any distance of time from the date of the instrument to which they are affixed.”⁵

SECTION II.

Of Documentary Evidence — which does not prove itself.

HAVING pointed out the species of documentary proofs which may be used in Courts of Equity, without the aid of any other evidence to authenticate them, or which, in other words, “prove themselves”; the next subject for consideration is the nature of the proofs requisite to enable a party to make use of documents which do not come under the same description. The rules upon

¹ Phil. & Amos on Evid. 652; *M'Kenire v. Fraser*, 9 Ves. 5.

² 6 Dowl. P. C. 202.

³ 1 Phil. Ev. (Cowen & Hill's ed. 1839,) 503; 1 Greenl. Ev. § 21, and cases in notes, § 570, and note; *Jackson v. Blanshan*, 3 John. 392; *Doe v. Deakin*, 3 C. & P. 402; *Doe v. Walley*, 8 B. & C. 22.

⁴ 2 Barn. & Adol. 648.

⁵ Phil. & Amos on Evid. 652; 1 Greenl. Ev. § 570.

this subject have been much simplified of late, and are in general the same in Equity as at Common Law, and will be found more fully set forth in any Treatise upon the Law of Evidence.

With respect to the cases in which different rules prevail, in Courts of Equity, from those which are adopted at Law, the most important are those of wills devising real estates.¹ At Law, it is sufficient to examine one witness to prove a will, if he can prove the due execution of it, unless it is impeached;² but, in Equity, in order to establish the will against the heir, all the witnesses must be examined.³ This rule was affirmed by *Bootle v. Blundell*.

¹ The Courts of Probate in Massachusetts have complete jurisdiction over the probate of wills, of both real and personal estate, and their decrees are conclusive upon all parties, and not re-examinable in any other Court. *Tompkins v. Tompkins*, 1 Story C. C. 547. See *Osgood v. Breed*, 12 Mass. 525, 533, 534; *Laughton v. Atkins*, 1 Pick. 535, 547, 548, 549. So in Connecticut. *Bush v. Sheldon*, 1 Day, 170; *Brown v. Lannan*, 1 Conn. 476. So in Rhode Island. *Tompkins v. Tompkins*, 1 Story C. C. 547. So in New Hampshire. *Poplin v. Hawke*, 8 New Hamp. 124. So in Ohio. *Bailey v. Bailey*, 8 Ohio, 239. See as to Kentucky, *Robertson v. Barbour*, 6 Monroe, 527; *Case of Wells's Will*, 5 Litt. 273. In North Carolina, said to be *prima facie* evidence. *Stanley v. Kean*, Taylor, 73. Illinois, see *Robertson v. Barbour*, 6 Monroe, 527, 528. Alabama, see *Tarver v. Tarver*, 9 Peters, 174. It is not necessary in Virginia that a will should be proved in a Court of Probate in order to give it validity as a will at law. *Bogwell v. Elliot*, 2 Rand, 196. As to New York, see *Dubois v. Dubois*, 6 Cowen, 494; 2 Rev. St. 57, § 7, ib. 58, § 15. See further on this subject, 1 Jarman on Wills, (Perkins's ed.) 23, note (2), and cases cited.

² Seton on Decrees, cites Peake's Evid. 401; 2 Greenl. Ev. § 694; *Jackson v. La Grange*, 19 John. 386; *Dan v. Brown*, 4 Cowen, 483; *Jackson v. Betts*, 6 Cowen, 377; *Turnipseed v. Hawkins*, 1 McCord, 272. In Pennsylvania, two witnesses are required in proof of every testamentary writing, whether in the general probate, before the Register of Wills, or upon the trial of an issue at common law; and each witness must separately depose to all the facts necessary to complete the chain of evidence, so that no link may depend upon the credibility of but one. *Lewis v. Maris*, 1 Dall. 278; *Hock v. Hock*, 4 Serg. & R. 47. And if there are three witnesses, and the proof is fully made by two only, it is enough without calling the third. *Jackson v. Vandyke*, 1 Cox, 28; *Fox v. Evans*, 3 Yeates, 506. But if one or both witnesses are dead, the will may be proved by the usual secondary evidence. *Miller v. Caruthers*, 1 Serg. & R. 205.

³ *Bootle v. Blundell*, 19 Ves. 505; Coop. 137, S. C. See also *Ogle v. Cook*, 1 Ves. 177; *Townshend v. Ives*, 1 Wils. 216; *Bullen v. Michel*, 2 Pri. 491; 2 Greenl. Ev. § 694, and note. Any person interested in the estate of the testator, may insist upon the production of all the subscribing witnesses to a will, at the probate thereof, if they are living, and subject to the process of the Court. *Chase v. Lincoln*, 3 Mass. 236. If it be impossible to procure any one of the witnesses, or he has become incompetent, the Court will proceed without him *ex*

This rule, although general, admits of necessary exceptions, and perhaps does not apply where the will is not wholly, but only partially, in question.¹ The rule also does not apply in cases where one of the witnesses is dead,² or is abroad ; in which cases proof of his handwriting has been held sufficient.³ It will be recollected that it is now a common practice to direct the trusts of a will to be carried into execution without establishing it. Where a witness has become insane,⁴ or has not been heard of for many years, and cannot be found, his evidence has been dispensed with.⁵

It is also necessary, in Equity, where the object of the suit is to establish a will against the heir, to prove the sanity of the testator.⁶

Although, where a will is to be established against an heir, the general rule, in Equity, is, that it must be proved by all the witnesses, or by producing evidence of their death and handwriting, &c. ; the same rule does not apply when proof of the will is required for other purposes, *i. e.* merely to enable it to be read as a legal instrument ; in such cases, one witness to prove it is sufficient.⁷ So, also, if the object of the suit is only to appoint new trustees to execute the trust of the will, one witness will be all that is required.⁸

It is to be remarked, that however clearly a will may be proved in the suit, the heir-at-law may still claim, as a right, an issue *de-necessitate rei*, and resort to the next best evidence of which the case will admit. *ib.* ; *Sears v. Bellingham*, 12 Mass. 358 ; *Brown v. Wood*, 17 Mass. 68. See *Swift v. Wiley*, 1 B. Monroe, 116 ; *Brown v. Chambers*, Hayes, Exch. 597. See *Powell v. Cleaver*, 2 Bro. C. C. (Perkins's ed.) 504, note (*b*) ; *Lord Carrington v. Payne*, 5 Sumner's Vesey, 404, Perkins's note (*a*), and cases cited.

¹ Per Lord Eldon in *Bootle v. Blundell*, 19 Ves. 505.

² *Ibid.*

³ *Lord Carrington v. Payne*, 5 Ves. 411. See also *Billing v. Brooksbank*, cited 19 Ves. 505 ; *Fitzherbert v. Fitzherbert*, 4 Bro. C. C. 231 ; and *Grayson v. Atkinson*, 2 Ves. 454, where it was held, that a commission should have been sent to examine the witness abroad ; but the rule in *Carrington v. Payne* seems to be the one now acted upon. *Seton on Decrees*, 83.

⁴ *Bernett v. Taylor*, 9 Ves. 381.

⁵ *James v. Parnell*, Turn. & Russ. 417 ; *McKenire v. Fraser*, 9 Ves. 5.

⁶ *Harris v. Ingledew*, 3 P. Wms. 93 ; *Wallis v. Hodgeson*, 2 Atk. 56 ; *Seton on Decrees*, 83 ; *Binfield v. Lambert*, 1 Dick. 337 ; *Bird v. Butler*, *ib.* notis ; *Fitzherbert v. Fitzherbert*, 4 Bro. C. C. 231 ; *Wood v. Stane*, 8 Pri. 615 ; ante, 848, 849.

⁷ *Concannon v. Cruise*, 2 Moll. 332.

⁸ *Wood v. Stane*, 8 Pri. 613.

visavit vel non;¹ and that the rule that all the witnesses must be examined, extends also to the trial of the issue before the jury.² In *Tatham v. Wright*,³ however, where the bill was not filed by the devisee to establish the will, but by the heir to set it aside, the defendant called one witness, and produced the other two, offering them to the plaintiff to call and examine them, which he declined, not wishing to make them his own witnesses; upon a motion for a new trial, which was twice argued, once before Sir John Leach, M. R., and secondly before Lord Brougham, C., assisted by Lord Chief Justice Tindal, and Lord Lyndhurst, C. B., the cause was held to have been sufficiently tried.⁴

With respect to wills of copyhold estates, it seems that it is not the practice to establish them against the heir-at-law.⁵ What will be a sufficient proof of them to induce the Court to act upon them when their validity is not admitted by the heir-at-law, does not seem quite clear. Lord Eldon, however, took occasion to observe, that according to the old practice of the Court, the fact of the probate of a will by the Ecclesiastical Court was not evidence that copyhold estates would pass by it.⁶

Whilst we are upon the subject of proving wills, it is as well to mention a practice which has prevailed in Courts of Equity, for compelling the production of the original wills, where they have been deposited in the registry of an Ecclesiastical Court. The Court, in the case of wills, has made an order upon the officer of the Ecclesiastical Court to deliver the original will to the solicitor in the cause, upon his giving security (to be approved by the Judge of the Court) to return it safe and undefaced within a particular time.⁷ In *Fauquier v. Tynte*,⁸ Lord Eldon seemed at a loss

¹ *Pemberton v. Pemberton*, 11 Ves. 53.

² *Bootle v. Blundell*, 19 Ves. 505; *Coop.* 137, S. C.

³ 2 Russ. & M. 1.

⁴ *Gresley Eq. Ev.* (Am. ed.) 123, 124; 2 *Greenl. Ev.* § 693.

⁵ *Archer v. Slater*, 10 Sim. 624; 11 Sim. 507, S. C.

⁶ *Jervaise v. Duke of Northumberland*, 1 J. & W. 570.

⁷ *Morse v. Roach*, 2 Strange, 961; 1 Dick. 65, S. C.; *Frederic v. Aynscombe*, 1 Atk. 627; *Pierce v. Watkin*, 2 Dick. 485; *Lake v. Causfield*, 3 Bro. C. C. 263; *Forder v. Wade*, 4 Bro. C. C. 476; *Hodson v. —*, 6 Ves. 135; *Ford v. —*, ib. 802. See also 2 *Equity Draftsman*, 362. And the note to *Wigan v. Rowland*, 10 Hare, Appx. 19; *Gann v. Gregory*, 3 De G., Mac. & Gor. 781.

⁸ 7 Ves. 292. This practice will probably not hereafter be adopted; see ante, p. 860 *et seq.*, as to the manner in which public documents may be proved, in which class it is presumed wills may be included.

to account for this deviation from the ordinary course (which he thought might be inoperative if the officer of the Ecclesiastical Court refused to obey the order), and declined to extend it to any other case than that of a will.

There are several cases in which a Court of Equity has in former times established a will without the production of the original, where the fact of the will having been proved and retained abroad, or other circumstances,¹ have rendered it impossible to bring the original before the Court.² But it seems that in such a case, strict proof of the execution and attestation have been given, unless they are admitted, or unless the will is old enough to prove itself.³ The contents of the will must be proved to the satisfaction of the Court, and in the absence of the original there are various means of secondary evidence applicable for this purpose.⁴ In *Pullen v. Rawlens*,⁵ sufficient secondary evidence was given, by means of a copy admitted to probate in this country, certified by the Registrar of the place where the original was deposited.

Another distinction which exists between the practice of Courts of Common Law and of Equity in matters of evidence, relates to proving the contents of documents in the hands of the adverse party, by secondary evidence. The grounds upon which secondary evidence of the contents of written documents is admitted, are in both jurisdictions the same; namely, that the party has not the means of producing them, because they are either lost or destroyed, or in the possession or power of the adverse party.⁶

At Law, where it is not known till the time of trial what evidence will be offered on either side, a party, in order to entitle himself to give secondary evidence of the contents of a written document, on the ground of its being in the possession of his adversary, ought to give him notice to produce it; for otherwise, *non constat*, that the best evidence might not be had.⁷ But even at

¹ *Ellis v. Medlicott*, cited 4 Beav. 144.

² A codicil destroyed without the testator's consent was established in *Clark v. Wright*, 3 Pick. 67 (2d ed.), 69, note (1), and cases cited.

³ *Rand v. M'Mahon*, 12 Sim. 553.

⁴ The evidence of the whole contents of the will must in such case, be most clear and satisfactory. *Davis v. Sigourney*, 8 Metcalf, 487; *Durfee v. Durfee*, 8 Metcalf, 490, note; *Huble v. Clark*, 1 Hagg. Eccl. R. 115.

⁵ 4 Beav. 142, where the cases are collected.

⁶ See now on this subject 17 & 18 Vict. c. 125, § 87.

⁷ 1 Phil. Ev. (Cowen & Hill's ed. 1839,) 439 *et seq.*; 3 ib. 1182, note, 834, and cases cited; 1 Greenl. Ev. § 560.

Law, when, from the nature of the proceeding, the party must know that the contents of a written instrument in his possession will come into question, it is not necessary to give any notice for its production; and, therefore, in an action of trover for a deed,¹ or upon an indictment for stealing a bill of exchange,² it has been held, that, without previous notice, parol evidence may be given of the contents of the instrument which is the foundation of the proceeding.³

The same exception to the general rule appears to be equally applicable in Courts of Equity; for there it is held, that when, either from the pleadings or depositions, a party is apprized that it is the intention of the opposite party to make use of secondary evidence of the contents of a document in his possession, such secondary evidence may be used at the hearing without serving the party in whose possession it is with notice to produce it.⁴

It may be mentioned, with reference to this subject, that, in *Parkhurst v. Lowten*,⁵ Lord Eldon appears to have thought, that, when a defendant admitted a deed to be in his possession, but declined to produce it, on the ground that it might convict him of simony, or any other criminal offence, secondary evidence of its contents may be received. The question, however, still remains to be decided.

Where written documents, which are not admitted, do not prove themselves, they must be proved by witnesses, in the same manner as documents of a similar description are proved in trials at Law.⁶ The witnesses, however, for this purpose are examined in the same way that witnesses are usually examined in causes in Equity, except in certain cases, in which the Court will permit them to be examined *vivâ voce* at the hearing.

By the recent Act 17 & 18 Vict. c. 125, it is provided, that "It shall not be necessary to prove, by the attesting witness, any instrument, to the validity of which attestation is not requisite; and such instrument may be proved by admission, or otherwise, as if there had been no attesting witness thereto."⁷

¹ *How v. Hall*, 14 East, 274.

² *Aickle's Case*, 1 Leach, 330.

³ 1 Greenl. Ev. § 561.

⁴ *Strickland v. Strickland*, 2 Mer. 461; and see *Hawkesworth v. Dewsnap*, 5 Sim. 460; *Wheat v. Graham*, 7 Sim. 61; *Gresley Eq. Ev. (Am. ed.)* 118.

⁵ 2 Swanst. 213.

⁶ 1 Greenl. Ev. § 589 *et seq.* and notes; *Gresley Eq. Ev. (Am. ed.)* 118, 119 *et seq.*

⁷ *Re Reay's Estate*, 19 Jur. 222.

With respect to cases where the statutes have imposed the necessity of a document being stamped before it is tendered in evidence, there does not seem to be any difference between the practice at Law and in Equity.¹

And now by the same Act 17 & 18 Vict. c. 125, the following provisions have been made concerning the admission of documents requiring a stamp:—“Upon the production of any document as evidence at the trial of any cause, it shall be the duty of the officer of the Court, whose duty it is to read such document, to call the attention of the Judge to any omission or insufficiency of the stamp; and the document, if unstamped, or not sufficiently stamped, shall not be received in evidence until the whole, or (as the case may be) the deficiency of the stamp duty, and the penalty required by statute, together with the additional penalty of one pound, shall have been paid.”

The 29th section directs what the officer is to do with the sum he receives, and directs that after the payment “such document shall be admissible in evidence, saving all just exceptions on other grounds.” It also provides that the aforesaid enactment shall not extend to any document which cannot now be stamped, after the execution thereof, on payment of the duty and a penalty.

Section 30 enacts, that “No document made or required under the provisions of this Act shall be liable to any stamp duty.”

No new trial is to be “granted by reason of the ruling of any Judge that the stamp upon one document is sufficient, or that the document does not require a stamp.”

SECTION III.

Of proving Exhibits by Affidavit or vivâ voce at the Hearing.

AN examination *vivâ voce* at the hearing has always been admitted for the proof of certain written documents, and even, in some cases, where the plaintiff proceeds to a hearing of the cause upon bill and answer only.”² By the 43d Order of August, 1841,

¹ Smith *v.* Henley, 1 Ph. 391.

² Fielder *v.* Cage, Prac. Reg. 219; Rowland *v.* Sturgis, 2 H. 520. Courts of Chancery have always had the power to examine witnesses *viva voce*, for the purpose of proving certain written instruments. Levert *v.* Redwood, 9 Porter, 80; Hughes

it was directed that, "In any cases in which any exhibit may, by the present practice of the Court, be proved *vivâ voce* at the hearing of a cause, the same may be proved by the affidavit of the witness who would be competent to prove the same *vivâ voce* at the hearing."¹ And by the 28th section of 13 & 14 Vict. c. 35, it was enacted, "That it should be lawful for the Court, at the hearing of any cause, or of any further directions therein, to receive proof by affidavit of all proper parties being before the Court, and of all such matters as are necessary to be proved for enabling the said Court to order payment of any moneys belonging to any married woman, and of all such other matters not directly in issue in the cause, as in the opinion of the said Court may safely and properly be so proved." And by the 36th section of the Chancery Amendment Act,² affidavits by particular witnesses, or affidavits as to particular facts or circumstances, might by consent or by leave of the Court, obtained on notice, be used on the hearing of any cause; and such consent, with the approbation of the Court, might be given by or on the part of married women or infants or other persons under disability. These enactments are, however, now of slight consequence, as it will be seen that all evidence may be given by affidavit.³

Amongst the documents which may be proved *vivâ voce* or by affidavit, may be classed "all ancient records of endowments and institutions, whether they are offered to be proved as original instruments, or as they are found collected and recorded in ancient register-books deposited in the registries of the archbishops and bishops, or of the deans and chapters of collegiate churches, or of the Ecclesiastical Courts, bulls of the popes, records from the Bodleian, Harleian, and Museum libraries, or from any of the public libraries belonging to the two universities, or from the library at Lambeth; all or any of which ancient documents must be pro-

v. Phelps, 3 Bibb, 199; *Gresley Eq. Ev.* (Am. ed.) 126; *Latting v. Hall*, 9 Paige, 483; *Dana v. Nelson*, 1 Aiken, 254. See *De Peyster v. Golden*, 1 Edw. 63; *Nesmitt v. Culvert*, 1 Wood. & Minot, 34; *Gafney v. Reeves*, 6 Ind. (Porter,) 71; *Morton v. White*, 5 Ind. (Porter,) 338.

¹ See *Blundell v. Gladstone*, 11 Sim. 489, as to the practice when a cause is set down upon the equity reserved or on further directions.

² 15 & 16 Vict. c. 86. See *Crofts v. Middleton*, 9 Hare, Appx. 18, 75.

³ It is provided, that the late change in the mode of taking evidence in Equity in Massachusetts, shall not prevent the use of affidavits where they have heretofore been allowed. Genl. Sts. c. 131, § 60.

duced by those persons in whose immediate custody they are, who must be sworn to identify the particular document or record produced in his custody before the same can be read.”¹

So in like manner may be proved as exhibits, office-copies of records² from any of the Courts at Westminster, or from the Ecclesiastical Courts of Canterbury, York, &c., or of grants or enrolments from the rolls or other records deposited there or in the Tower, or of records or proceedings from Courts of inferior jurisdiction in England, as those of the counties palatine of Chester, Lancaster or Durham, or of the Courts of Great Session in Wales, or of the Courts of the two universities, or of the city of London, or of the Cinque Ports.

Deeds, bonds, or other instruments, which require proof of their due execution by a subscribing witness or witnesses, or promissory notes, bills of exchange, letters or receipts, of which proof must be made of the handwriting of the persons writing or subscribing the same, are all considered as exhibits, and may be proved *vivâ voce* or by affidavit.

By the Common Law Procedure Act, 1854, sect. 26, an important change has taken place in the mode of proving deeds. It enacts that “It shall not be necessary to prove, by the attesting witness, any instrument, to the validity of which attestation is not requisite; and such instrument may be proved by admission, or otherwise, as if there had been no attesting witness thereto.”³

Upon proving a deed by the attesting witness, the usual questions are three. Is that your handwriting? Did you see *A. B.* sign this deed? Did you see him deliver it?⁴

It is to be observed, that, with the exception of documents coming out of the hand of a public officer having the care of such documents, (which are proved by the mere examination of the officer to that fact,) no exhibit can thus be proved, that requires more than the proof of the execution or of handwriting to substantiate it;⁵ if it be anything that admits of cross-examination or that requires any evidence besides that of handwriting, it cannot be received.⁶ This rule is strictly adhered to; and in many cases,

¹ 2 Fowl. Ex. Pr. 157.

² See ante, p. 860.

³ *Re Reay's Estate*, 19 Jur. 222.

⁴ *Bowser v. Colby*, 1 Hare, 132, n.

⁵ See *Ellis v. Deane*, 3 Moll. 62; *Emerson v. Berkley*, 4 Hen. & Munf. 441.

⁶ *Lake v. Skinner*, 1 Jac. & W. 9, 15. It seems, however, that the Court will, upon the suggestion of counsel, put questions to a witness who is examined *vivâ voce*. See *Turner v. Burleigh*, 17 Ves. 354.

where an instrument which, *primâ facie*, appears to be an exhibit, requires more formal proof, it cannot be received as one.¹

For the same reason, a will of real estate cannot be proved *vivâ voce*, because, besides the mere execution of the will, the sanity of the testator must be established.² But where a power is required to be exercised by a deed executed in the presence of, and attested by witnesses, the deed by which the power is exercised cannot be proved *vivâ voce* at the hearing of the cause.³ So where a book, in which the collector of a former rector had kept accounts of the receipts of tithes, was offered to be proved *vivâ voce*, it was rejected, because, besides proving the handwriting, it would be necessary to prove that it came out of the proper custody, and that the writer was the collector of the tithes.⁴

If a document is impeached by the answer of a defendant, it cannot be proved *vivâ voce*, on the part of the plaintiff, against such defendant. Thus, where the answer of one of the defendants in a cause insisted that a covenant was fraudulently inserted in a deed, the deed was not allowed to be proved *vivâ voce* against that defendant, although it might have been so proved against the other defendant, who had not impeached its authenticity.⁵

It is only, however, where the *execution* or the *authenticity* of a deed is impeached, that it cannot be proved *vivâ voce*; if the *validity* of it only is disputed, it may be so proved.⁶

¹ Earl Pomfret v. Lord Windsor, 2 Ves. 472; Bloxton v. Drewit, Prec. in Cha. 64; Ellis v. Deane, 3 Moll. 63; Emerson v. Berkley, 4 Hen. & Munf. 441; Gresley Eq. Ev. (Am. ed.) 128. It is said not to be, strictly speaking, correct to say, that no questions, which will admit of a cross-examination, may be asked a witness thus proving exhibits; but the fact is, that the examination is restricted to three or four very simple points, such as the custody and identity of an ancient document produced by a librarian or registrar, the accuracy of an office-copy produced by the proper officer, the execution of a deed where the examinant is the attesting witness, the handwriting of a letter, or receipt, or promissory note, &c., &c. Gresley Eq. Ev. (Am. ed.) 126.

Where a minor is a party, the Court will not permit a witness to be examined *vivâ voce* at the hearing of the cause, to prove a deed or exhibit, which must be proved at the office, by an examination of the witness upon interrogatories. White v. Baker, 1 Irish Eq. 282.

² Harris v. Ingledew, 3 P. Wms. 93; Niblett v. Daniell, Bunb. 310; 2 Fowl. Ex. Pr. 188.

³ Brace v. Blick, 7 Sim. 619.

⁴ Lake v. Skinner, 1 Jac. & W. 9.

⁵ Barfield v. Kelly, 4 Russ. 355; Mabur v. Hobbs, 1 Y. & C. Exch. Rep. 585; Hitchcock v. Carew, 1 Kay, Appx. 14.

⁶ Attorney-General v. Pearson, 7 Sim. 303.

In the case of *Rowland v. Sturges*,¹ the plaintiff in a foreclosure was allowed to prove by affidavit the mortgage deed under which he claimed, where it was neither admitted nor denied by the defendant.

It is necessary, in order to authorize the examination of a witness *vivâ voce* at the hearing of a cause, or by affidavit,² that the party intending to make use of the exhibits should previously obtain an order for that purpose.³ This order may be obtained, by the party requiring it, by motion in Court without notice, or by petition to the Master of the Rolls ;⁴ and it is often granted during the hearing of the cause ;⁵ in which case the cause will either be ordered to stand over for the purpose of enabling the order to be served and acted upon, or if the witness is in Court, it may be acted upon immediately.

The order, when drawn up, must describe the exhibits to be proved ;⁶ and it is always made as of course, "*saving all just exceptions.*"⁷

The order being drawn up, passed, and entered, a copy thereof must be served, in the usual manner, upon the adverse solicitor, two days previous to the hearing of the cause.⁸

When the cause is called on, and the exhibit required to be proved, the original order and the exhibit described therein, together with the witness to prove the same, must be produced to the Registrar in Court, who will administer the usual oath ; the examination, also, of the witness, as to the execution, &c., is performed by the Registrar.⁹

It may not be unnecessary to mention that no documents but those mentioned or described in the order can be thus proved at the hearing ; and as the order saves just exceptions, all objections

¹ 2 Hare, 520. See, however, *Jones v. Griffith*, 14 Sim. 262.

² *Clare v. Wood*, 1 Hare, 341.

³ See *Emerson v. Bakley*, 4 Hen. & Munf. 441 ; *Barrow v. Rhineland*, 1 John. Ch. 559 ; *Gresley Eq. Ev. (Am. ed.)* 126.

⁴ *Graves v. Budget*, 1 Atk. 444.

⁵ *Bank v. Farques*, Amb. 145.

⁶ *Gresley Eq. Ev. (Am. ed.)* 126. To authorize a party to produce, at the hearing, documentary evidence which is not made an exhibit before the examiner, nor distinctly referred to in the pleadings, the notice of intention to make use of such evidence should state sufficient of the substance of the document intended to be produced to enable the adverse party to see that it is evidence of some fact against him. *Miller v. Avery*, 2 Barb. Ch. 582.

⁷ *Hind*. 370.

⁸ *Ibid.*

⁹ *Hind*. 371.

which can be taken to the admissibility of the document as evidence may, then, be urged by the opposing party.

The attendance of an unwilling witness to prove an exhibit at the hearing, may be enforced by process of subpœna, which is to be obtained in the manner which will be hereafter pointed out with regard to ordinary *subpœnas ad testificandum*; ¹ and must be in the following form:—

“*Victoria, &c. To —, greeting. We command you, [and every of you,] that laying all other matters aside, and notwithstanding any excuse, you personally be and appear before our Lord High Chancellor, [or before his Lordship or Honor the Master of the Rolls, or Mr. —, one of the Masters of our High Court of Chancery, or before E. F. or G. H., Commissioners named in a commission issued to them for that purpose,] at such time and place as the bearer hereof shall by notice in writing appoint, to testify the truth according to your knowledge in a certain suit now depending in our High Court of Chancery, wherein — [and others or another] are plaintiffs, and — [and others or another] are defendants, on the part of the —; in case of a subpœna duces tecum, add, and that you then and there bring with you and produce, &c.] And hereof fail not at your peril. Witness, &c.*” ²

A subpœna of this nature requires the same personal service as a subpœna to testify in other cases; and every circumstance to be observed in serving an ordinary *subpœna ad testificandum*, such as tender or payment of sufficient money to pay the expenses of the witness, &c., must be observed in serving this. ³

The party who serves the subpœna must, at the same time that he serves it, deliver to the witness a notice in writing appointing the time and place for the witnesses' attendance; with respect to which, it is to be observed, that the time must be a reasonable time before the day fixed for the notice.

It may be noticed, in this place, that where one party has proved written documents in a cause, the other side has no right, upon that ground, to call for an inspection of them before the

¹ A subpœna to examine a witness before a Judge in open Court, pursuant to the 39th section 15 & 16 Vict. c. 86, cannot issue without a direction from the Judge, or an order to be at liberty to examine *vivâ voce* at the hearing.

² Order of May, 1845, Appx.

³ See post, Part III. Sect. 2.

hearing; because a party can have no right to see the strength of his adversary's case, or the evidence of his title, before hearing.¹

PART III.—OF ORAL TESTIMONY.

SECTION I.—*Who may be Witnesses.*²

II. *Oral or unwritten testimony* is that which is given by, or taken down from, the mouth of living witnesses.

All persons are competent to be witnesses in Equity, who are capable of being witnesses in trials at Law.³

With respect to the cases in which a witness is deemed incompetent to give any evidence at all, until recently, this subject was one of no small difficulty and complexity; but recent Acts have almost entirely obliterated the learning of ages, and it may now be laid down generally, that there are only two grounds on which evidence can be refused: 1st, Where the witness labors under a defect of understanding;⁴ 2nd, Where he refuses to take an oath, or, from defect of religious opinion, does not acknowledge its sanction.⁵

¹ *Davers v. Davers*, 2 P. Wms. 410; *Hodson v. Earl of Warrington*, 3 P. Wms. 35.

² A Judge cannot be a witness in a cause on trial before him. 1 Greenl. Ev. § 364.

³ The rules of evidence are the same in Courts of Equity as in Courts of Law. *Morrison v. Hart*, 2 Bibb, 5; *Lemaster v. Burekhart*, 2 Bibb, 28; *Dwight v. Pomeroy*, 17 Mass. 303; *Reed v. Clark*, 4 Monroe, 20; *Stevens v. Cooper*, 1 John. Ch. 425; *Baugh v. Ramsey*, 4 Monroe, 137; *Eveleth v. Wilson*, 15 Mass. 109.

⁴ See 1 Greenl. Ev. § 365; *Gresley Eq. Ev. (Am. ed.)* 237; 1 Phil. Ev. (Cowen & Hill's ed. 1839,) 18, 19, notes (47), (48). As to the competency of *deaf and dumb* persons, see 1 Greenl. Ev. § 366; *State v. De Wolf*, 8 Conn. 93; *Commonwealth v. Hill*, 14 Mass. 207; 1 Phil. Ev. (Cowen & Hill's ed. 1839,) 19, and note (49). As to the competency of children, 1 Greenl. Ev. § 367; *Gresley Eq. Ev. (Am. ed.)* 237; 1 Phil. Ev. (Cowen & Hill's ed. 1839,) 19, 20, notes (50), (51), (52).

⁵ *Gresley Eq. Ev. (Am. ed.)* 237, 238; 1 Greenl. Ev. § 368–370, and notes and cases cited; 1 Phil. Ev. (Cowen & Hill's ed. 1839,) 20–27, and notes.

It may be considered as now generally settled, in the United States, that it is not material whether the witness believes that the Divine punishment, which is the consequence of perjury, will be inflicted in this world or in the next. It is enough

The 6th & 7th Vict. c. 85, enacted, "That no person offered as a witness shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence either in person or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any Court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having by law or by consent of parties authority to hear, receive, and examine evidence, but that every person so offered, may and shall be admitted to give evidence on oath or solemn affirmation, in those cases where affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matters in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding, in which he is offered as a witness; and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence; *provided that this Act shall not render competent any party to any suit, action, or proceeding, individually named in the record, or any lessor of the plaintiff or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended either wholly or in part, or the husband or wife of such persons respectively*: Provided, that in Courts of Equity any defendant to any cause pending in any such Court may be examined as a witness on the behalf of the plaintiff, or of any co-defendant in any such cause, saving just exceptions;¹ and that any interest which such defendant so to be examined may have in the matters, or in any of the matters in question in the cause, shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as

if he has the religious sense of accountability to the Omniscient Being who is invoked by an oath. 1 Greenl. Ev. § 370, and note; 3 Phil. Ev. Cowen & Hill's notes 1503, notes (53), (55). In Maine, a belief in the existence of the Supreme Being is rendered sufficient, by statute, 1833, ch. 58, without any reference to rewards and punishments. *Smith v. Coffin*, 18 Maine, 157.

In Massachusetts, every person not a believer in any religion shall be required to testify truly under the pains and penalties of perjury; and the evidence of such person's disbelief in the existence of God may be received to affect his credibility as a witness. Genl. Sts. c. 131, § 12.

¹ See now *Swann v. Wortley*, 9 Hare, 460.

affecting or tending to affect the credit of such defendant as a witness.”¹

This statute effectually prevented any objection from infamy or interest ever hereafter being taken to a witness, not a party to the record, in a suit commenced after the passing of the Act.

With respect to parties to the record we have seen that the stat. 6 & 7 Vict. c. 85, expressly enabled defendants to be examined, either on behalf of the plaintiff, or on behalf of any co-defendant, but it does not enable a plaintiff to be examined either by a co-plaintiff, or by any of the defendants. And now by the recent Act 14 & 15 Vict. c. 99, s. 1, the proviso relative to parties printed in italics in the 6 & 7 Vict. c. 85, is repealed, and in lieu thereof it is enacted by sect. 2, that “On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any such action or other proceeding in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall give evidence either *vivâ voce*, or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding.”² And by the 16 & 17 Vict. c. 83, s. 4, the incapacity to give evidence between husband and wife is now removed in all cases except criminal proceedings and adultery.³

¹ For the decisions on this statute, see *Monday v. Guyer*, 1 De G. & Sm. 182; *Carrington v. Pell*, 3 De G. & Sm. 512; *Wood v. Rowcliffe*, 6 Hare, 183. In Massachusetts, no person shall be excluded by reason of crime or interest from giving evidence as a witness either in person or by deposition in any proceeding, civil or criminal, in Court, or before a person having authority to receive evidence. But the conviction of any crime may be shown to affect the credibility of a witness. Genl. Sts. c. 113, § 13.

² *Harford v. Rees*, 9 Hare, Appx. 70.

³ See *Alcock v. Alcock*, 5 De G. & Sm. 671. In Massachusetts, parties in “civil actions and proceedings, including” “suits in Equity,” “shall be admitted as competent witnesses for themselves or any other party; and in any such case in which the wife is a party or one of the parties, she and her husband shall be competent witnesses for and against each other, but they shall not be allowed to testify as to private conversations with each other; *provided*, that where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the Court to be insane, the other party shall not be admitted to testify in his own favor; and where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to

SECTION II.

The Mode of examining Witnesses.

THE general mode of examining witnesses in Equity was, until the recent Act¹ to amend the practice of the Court of Chancery, testify, except as to such acts and contracts as have been done or made since the probate of the will, or the appointment of the administration." Genl. Sts. c. 131, § 14.

In Chancery, parties to the record were always subject to examination, as witnesses, much more freely than at law. A plaintiff might obtain an order as of course, to examine a defendant, and a defendant a co-defendant, as a witness, upon affidavit that he was a material witness, and was not interested on the side of the applicant, in the matter to which it was proposed to examine him; the order being made subject to all just exceptions. If the answer of the defendant had been replied to, the replication must be withdrawn before the plaintiff could examine him. But a plaintiff could not be examined by a defendant, except by consent, unless he was merely a trustee, or had no beneficial interest in the matter in question. Nor could a co-plaintiff be examined by a plaintiff, without the consent of the defendant. The course in the latter of such cases was to strike out his name as plaintiff, and make him a defendant, and in the former to file a cross-bill. 1 Greenl. Ev. § 361; 1 Smith Ch. Pr. 343, 344; *Eckford v. Dekay*, 6 Paige, 565. See *Hill v. Hill*, 9 Gill & John. 81; *De Wolf v. Johnson*, 10 Wheat. 367; *Gresley Eq. Ev. (Am. ed.)* 242 *et seq.*; *Second v. First Cong. Society*, in *Hopkinton*, 14 N. Hamp. 315. Where one party was examined as a witness against another party in the same cause, he might be cross-examined like any other witness by the party against whom he was called, and his evidence could not be used in his own favor. *Benson v. Le Roy*, 1 Paige, 122. But where a party was examined before a Master in relation to his own rights, and the examination was in the nature of a bill of discovery, he could not be cross-examined by his own counsel, nor could he give evidence in his own favor, any further than his answers were responsive to the questions put to him. *Ib.* He must, however, accompany his answer by explanations responsive to the interrogatory, which might be necessary to rebut any improper inference arising from such answer. *Ib.* See *Armsby v. Wood*, 1 Hopk. 229. A party might be a witness for himself, by the consent of his adversary; and his deposition, read without objection, might operate for him as well as for his co-defendant, especially when because of his insolvency he had no real interest. *Fletcher v. Wier*, 7 Dana, 356.

A defendant might examine a mere nominal plaintiff, with his assent, as a witness against the real plaintiff. But a defendant who had a common interest with the plaintiff in the suit, could not examine such plaintiff as a witness against a defendant, for the purpose of sustaining the claim made by the bill. *Eckford v. Dekay*, 6 Paige, 565.

If there were more defendants than one, an examination of a defendant might

¹ 15 & 16 Vict. c. 86.

by interrogatories in writing, exhibited by the party, plaintiff or defendant, or directed by the Court to be proposed to or asked of the witnesses in a cause, touching the merits thereof or some incident therein. This practice has, however, been almost entirely abolished, and a new system substituted in its place by recent statutes and orders of the Court;¹ and it will be convenient, in the first place, to set out these statutes and orders verbatim.

be had, and a decree obtained against another defendant upon the facts elicited by such examination; but a decree could not be had against the party examined, embracing such facts. *Palmer v. Van Doren*, 2 Edw. Ch. 192; *Bradley v. Root*, 5 Paige, 633. Where a defendant had been examined under the usual order, as a witness, a plaintiff might have a decree against him upon other matters, to which he was not examined. *Palmer v. Van Doren*, 2 Edw. Ch. 192. The rule, that a plaintiff could not have a decree against a defendant, whom he had examined as a witness in the cause, did not apply to the case of a mere formal defendant, as an executor or trustee, against whom no personal decree was sought, and who had no personal interest in the question, as to which he was examined as a witness against his co-defendants; nor to the case of a defendant, who by his answer admitted his own liability, or who suffered the bill to be taken as confessed against him. *Bradley v. Root*, 5 Paige, 633. Where a defendant admitted that he was primarily liable to the plaintiff for the payment of the demand, for which the suit was brought, he might be examined either by the plaintiff or by his co-defendants, as a witness in the cause. *Ib.* See *Ragan v. Echols*, 5 Georgia, 71; *Palmer v. Van Doren*, 2 Edw. Ch. 192; *Fulton Bank v. Sharon Canal Co.* 4 Paige, 127; *Ormsby v. Bakewell*, 7 Ohio, 98; *Ragan v. Echols*, 5 Georgia, 71.

An order allowing a defendant to examine his co-defendant as a witness would always be granted upon a *suggestion* that the party to be examined had no interest in the cause, leaving the question of interest to be settled at the hearing, upon the proofs. *Nevill v. Demeritt*, 1 Green Ch. 321. This order was obtained on affidavit in New York. See New York Chancery Rules, 73; *Amer. Life Ins. & Trust Co. v. Sackett*, 1 Barb. Ch. 585. After a decree, it was not a motion of course for one defendant to examine another; and a special ground must be laid for it. *Williams v. Maitland*, 1 Ired. Eq. 93; *Sharp v. Runk*, Halst. Dig. 173; *Lord Dungannon v. Skinner*, 1 Hogan, 269, 281. The adverse party might at the hearing object to the competency of a defendant's examination, and if he appears to be interested in the matters to which he was examined, the objection might be taken at the hearing, though it had not been made before. *Mohawk Bank v. Atwater*, 2 Paige, 54.

¹ In Massachusetts, "in proceedings in Equity the evidence shall be taken in the same manner as in suits at law, unless the Court for special reasons otherwise directs; but this shall not prevent the use of affidavits where they have heretofore been allowed." Genl. Sts. c. 131, § 60. Under the above statute, the evidence "is to be taken *vivâ voce* when it can be so taken, and when depositions would be allowed in an action at law, they may be taken in Equity; and all the rules of law, as to the taking and filing of depositions at law, will apply in Equity. And this statute necessarily supersedes the rules of Court, as to the

The 28th section is as follows : — “ The mode of examining witnesses in causes in the said Court, and all the practice of the said Court in relation thereto, so far as such practice shall be inconsistent with the mode hereinafter prescribed of examining such witnesses, and the practice in relation thereto, shall, from and after the time appointed for the commencement of this Act, be abolished : Provided always, that the Court may, if it shall think fit, order any particular witness or witnesses within the jurisdiction of the said Court, or any witness or witnesses out of the jurisdiction of the said Court, to be examined upon interrogatories in the mode now practised in the said Court, and that with respect to such witness or witnesses the practice of the said Court in relation to the examination of witnesses shall continue in full force, save only so far as the same may be varied by any General Order of the Lord Chancellor in that behalf, or by any order of the Court with reference to any particular case.”

It will be observed that the former practice is reserved with respect to any particular witness within the jurisdiction of the Court, and also generally with respect to all the witnesses in the cause out of the jurisdiction of the Court ; consequently, if the Court thinks fit, the former practice will apply in the case of witnesses being examined abroad. The subject of commissions to examine witnesses abroad will be mentioned hereafter ; but as to witnesses within the jurisdiction, it will be sufficient to say, that they were formerly examined upon interrogatories drawn and signed by counsel, before an examiner of the Court, and this practice may, if the Court thinks fit, still be resorted to.¹

By the 29th and 30th sections it was enacted to the effect, that, after the cause was at issue, the parties might give notice to one taking and filing of depositions in Chancery.” And, in a suit in Equity, where a commission was applied for to take the testimony of a witness residing out of the Commonwealth, after the time fixed by the rules of Court for setting the cause down for hearing, the Court said : “ The plaintiff is, therefore, entitled to have a commission issue, as he would have been according to the established rule and practice at law, where testimony is to be taken out of the jurisdiction of the Court.” Per Shaw C. J. in *Pingree v. Coffin*, 12 Cushing, 600, 601.

In Wisconsin, each party to a suit in Equity has a right to have his witnesses examined in open Court, subject to the occasional exceptions provided for in cases at law. *Noonan v. Orton*, 5 Wis. 60.

¹ So under the amendment of the 67th of the Rules in Equity of the Supreme Court of the United States.

another whether they desired the evidence to be adduced orally¹ or by affidavit. By, however, the somewhat plenary powers conferred upon the Judges by the Act of Parliament, they have been enabled practically to repeal this section of the statute, and in lieu thereof it is directed by the Orders of June, 1854, "That it shall not be competent for the plaintiff or any defendant to require, by notice or otherwise, that the evidence to be adduced in a cause shall be taken orally, but when issue shall have been joined in any cause, the plaintiffs and defendants respectively shall be at liberty to transfer their respective cases, either wholly or partially by affidavit, or wholly or partially by the oral examination of witnesses before one of the examiners of the Court, or before an examiner to be specially appointed by the Court."²

The statute then proceeds to enact the manner in which the oral examination of witnesses shall be conducted. By the 31st section,³ "All witnesses to be examined orally under the provisions of this Act shall be so examined by or before one of the examiners of the Court, or by or before an examiner to be specially appointed by the Court ;⁴ the examiner being furnished by the plaintiff with a

¹ By an amendment of the 67th Equity Rule of the Supreme Court of the United States, March 17, 1862, "Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the Court, or before an examiner to be specially appointed by the Court," &c. And notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors or parties of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

² See *Gresley Eq. Ev.* (Am. ed.) 50 *et seq.* Under the practice heretofore existing in New York, each party had a right to select his own examiner, and the Court would not, on motion of the opposite party, interfere with that right. But a direct examination might be had before one examiner, and a cross-examination before another. *Troup v. Haight*, 6 John. Ch. 335.

³ The provisions of this section have been adopted by the Supreme Court of the United States by an amendment, of the 67th of the Rules in Equity, made March 17, 1862 ; 24 Law Rep. 380, 381.

⁴ The Circuit Courts of the United States have power to appoint examiners in suits in Equity, and it is a matter of discretion whether they be standing examiners, or be designated as the occasion arises for their services in any cause. *Van Hook v. Pendleton*, 2 Blatch. C. C. 85 ; 78th of the U. States Equity Rules. But in the Circuit Courts of the United States, an oral examination of witnesses before an examiner, previous to the amendment of the 67th Rule in March, 1862, was irregular, unless there was an agreement between the parties to waive written interrogatories ; and such agreement ought to be in writing. *Van Hook v. Pendleton*, 2 Blatch. C. C. 85.

By the 67th Equity Rule of the Supreme Court of the United States, it

copy of the bill, and of the answer, if any, in the cause; and such examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses so examined orally shall be subject to cross-examination and re-examination; and such examination, cross-examination and re-examination shall be conducted as nearly as may be in the mode now in use in Courts of Common Law with respect to a witness about to go abroad, and not expected to be present at the trial of a cause.”¹

By the 32d section, “The depositions taken upon any such oral examination as aforesaid shall be taken down in writing by the examiner,² not ordinarily by question and answer, but in the form of

is provided that the commissioner or commissioners to take depositions under a commission shall in all cases be named by the Court or by a Judge thereof.

¹ This form of examination is recommended by very high authorities in the evidence given before the commission. See the evidence of Lord St. Leonards, p. 15; and the evidence of Lord Cranworth, p. 24. It has always heretofore been a great objection to the Court of Chancery, that no evidence could be adduced before it excepting in the form of answers to written interrogatories. The proposed plan is not the same as that adopted in Courts of Law, inasmuch as the witness does not give his evidence before the Judge who tries the case. The witness is, however, subject to cross-examination in the presence of the parties, their counsel, solicitors, and agents; and the result of the examination and cross-examination can be communicated to the Judge by a competent authority. The Court may appoint an examiner to examine witnesses *visâ voce* out of the jurisdiction of the Court; *Crofts v. Middleton*, 9 Hare, Appx. 18; or residing more than twenty miles from London; *Read v. Prest*, 1 Kay, Appx. 14; and it seems that an order for a special examiner may be obtained by summons in Chambers; *Williams v. Williams*, 17 Jur. 434. See, however, *Brenan v. Preston*, 10 Hare, Appx. 17; *Pillan v. Thompson*, 10 Hare, Appx. 76. See 1 Hoff. Ch. Pr. 458–470. In the case of *Marston v. Brackett*, 9 N. Hamp. 346, the Court said they should, until the matter was otherwise regulated, permit the parties and counsel to be present at the examination of witnesses, and put interrogatories in writing, through the commissioner, in aid of the interrogatories filed in the cause, for the purpose of drawing out whatever knowledge the witnesses might have on the subjects embraced in the interrogatories filed, but in no case to address the witnesses, or make any suggestions to them, or to the commissioner, or in any other way to interfere with the examination.

² A witness should go before the examiner, free to answer all interrogatories, and not with a deposition already prepared. *Underhill v. Van Cortlandt*, 2 John. Ch. 339. A deposition, prepared and written by the party for whom it is taken, cannot be received as evidence. *Amory v. Fellows*, 5 Mass. 219. See *Ray v. Walton*, 2 A. K. Marsh. 71. Although it is copied by a third person. *Griswold v. Griswold*, 1 Root, 259. The deposition is equally inadmissible, if drawn by the agent of the party. *Smith v. Huntington*, 1 Root, 226; *Allen v. Rand*, 5 Conn. 322; *Patterson v. Patterson*, 2 Pennsylv. 200; *Addleman v. Masterson*,

a narrative, and when completed shall be read over to the witness, and signed by him¹ in the presence of the parties, or such of them as may think fit to attend : Provided always, that in case the witness shall refuse to sign the said depositions, then the examiner shall sign the same, and such examiner may, upon all examinations, state any special matter to the Court as he shall think fit : Provided also, that it shall be in the discretion of the examiner to put down any particular question or answer, if there should appear any special reason for doing so ; and any question or questions which may be objected to shall be noticed or referred to by the examiner in or upon the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement on the face of the depositions, but he shall not have power to decide upon the materiality or relevancy of any question or questions ; and the Court shall have power to deal with the costs of immaterial or irrelevant depositions as may be just.”²

By the 33d section, “ If any person produced before any such examiner as a witness shall refuse to be sworn, or to answer any lawful question put to him by the examiner, or by either of the parties, or by his or their counsel, solicitor, or agent, the same course shall be adopted with respect to such witness as is now pursued in the case of a witness produced for examination before an examiner of the said Court, upon written interrogatories, and refusing to be sworn, or to answer some lawful question : ”³ Provided

1 ib. 454. See *U. States v. Smith*, 4 Day, 121 ; *Logan v. Steele*, 3 Bibb, 230. The practice of having the questions shown to the witness, and his answers prepared beforehand, and reduced to writing and examined by counsel before coming before the Master to testify, was severely reprehended in *Hickok v. Farmers' and Mechanics' Bank*, 35 Vermont, 476, 490.

¹ In Pennsylvania, a deposition taken under a commission need not be subscribed by the witnesses. *Moulson v. Hargrave*, 1 Serg. & R. 201. In Kentucky, it is no objection to a deposition that the witness omitted to subscribe his name. *Mobley v. Hamit*, 1 A. K. Marsh. 590. So in North Carolina. *Rutherford v. Nelson*, 1 Hayw. 105 ; *Murphy v. Work*, 1 Hayw. 105. So in Virginia. *Barrett v. Watson*, 1 Wash. 372. So in Alabama. *Wiggins v. Pryor*, 3 Porter, 430. A deposition taken under a commission to take the deposition of John Priestly, may be read in evidence, though signed John G. Priestly. *Brooks v. McKean*, Cooke, 162. See *Breyfogle v. Beckley*, 16 Serg. & R. 264.

² The provisions of this section have substantially been adopted by the Supreme Court of the United States by an amendment of the 67th of the Rules in Equity, made March 17, 1862 ; 24 Law Rep. 380, 381.

³ This provision is substantially adopted by the Supreme Court of the United

always, that if any witness shall demur or object to any question or questions which may be put to him, the question or questions so put, and the demurrer or objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the Record Office of the said Court, to be there filed ; and the validity of such demurrer or objection shall be decided by the Court ; and the costs of and occasioned by such demurrer or objection shall be in the discretion of the Court."

As this section continues in force the former practice concerning defaulting and refusing witnesses, it will be convenient now to state what that practice was.

If a witness, upon being served with a *subpœna* and notice, neglect or refuse to attend to be examined, a certificate of the interrogatories having been filed, and that the witness has not attended to be sworn to them, must be obtained from the examiner, and an affidavit must be made and filed of the personal service of the *subpœna* and of the notice in writing delivered at the same time. An application is next to be made, by motion of course, in Court, that the witness do, at his own expense, attend, and be sworn and examined, in four days, or that he may stand committed to the Queen's Prison ; and the Court, upon hearing the certificate and affidavit read, will make an order upon the witness that he attend the examiner and be examined to the interrogatories filed, in four days after personal service of the order, or, in default, that he stand committed to the Queen's Prison.¹

This order being drawn up, passed, and entered, a copy of it must be served upon the witness *personally*, the original order being shown him at the same time. And if the witness obstinately persists in his neglect or refusal to attend, an affidavit of the service of the order must be made and filed, and another certificate obtained from the examiner that the witness has not attended to be sworn to the interrogatories ; the Court, then, upon a further application, by motion of course, will make an order for the commitment of the witness to the Queen's Prison, the affidavit of personal States in the amendment of the 67th of their Rules in Equity, March 17, 1862 ; 24 Law Rep. 381.

¹ See 78th Equity Rule of the United States Courts ; by which it is provided, that if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of the Court, which being certified to the Clerk's office by the commissioner, Master, or examiner, an attachment may issue thereupon by order of the Court or of any Judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the Court.

service of the former order, and the certificate from the examiner, being read in Court at the time of the motion. This order being drawn up, passed, and entered, must be delivered to the tipstaff attending the Court, who will thereupon procure a warrant from the Lord Chancellor's secretary, and, being instructed as to the person and residence of the witness, will apprehend and convey him to the Marshal of the Queen's Prison, where he must remain in custody, not only until he has been examined upon the interrogatories, but also until payment of costs to the party requiring his testimony, to be taxed by a Master, and likewise the tipstaff's and warden's fees for taking and detaining him.¹

A witness thus dealt with, after he has been examined, and tendered or paid the costs, will, upon motion or petition, and production of the examiner's certificate of his examination being complete, be discharged by the Court, or he may be discharged by the party at whose instance he was committed, if the gaoler can be prevailed upon to take such discharge.²

The method is, *mutatis mutandis*, the same when a witness having attended in obedience to the *subpœna*, refuses to be sworn.³

Where a witness, attending upon a *subpœna duces tecum*, refused to produce the document mentioned in the writ when required, he was ordered, upon special motion, to attend again and produce it, and to pay the plaintiff all the costs occasioned by his refusal.⁴

The statute then proceeds to enact, by the 34th section, that "When the examination of witnesses before any examiner shall have been concluded, the original depositions, authenticated by the signature of such examiner,⁵ shall be transmitted by him to the

¹ Hind. 629.

² Ibid. 330.

³ Hennegal v. Evance, 12 Ves. 201.

⁴ Bradshaw v. Bradshaw, 1 R. & M. 258.

⁵ See Glover v. Millings, 2 Stew. & Port. 28. In cases, where depositions have been taken under a commission, it will be presumed that the commissioners have done their duty in keeping and forwarding depositions, unless the contrary appear. Ib. Commissioners to take depositions should certify, in their return, that they caused the witness to be examined on oath upon the interrogatories annexed, and that they caused the examination to be reduced to writing; otherwise the depositions cannot be read. Bailis v. Cochran, 2 John. 417. See Glover v. Millings, *ubi supra*; Pettibone v. Derringer, 4 Wash. C. C. 215. It is sufficient that the commissioners certify, in their return, that the oath has been duly taken by them. Wilson v. Mitchell, 3 Har. & John. 91; Glover v. Millings, *ubi supra*; Bolte v. Van Rooten, 130.

Record Office of the said Court, to be there filed,¹ and any party to the suit may have a copy thereof, or of any part or portion thereof, upon payment for the same in such manner as shall be provided by any General Order² of the Lord Chancellor in that behalf."

By the 35th section, "It shall not be necessary to sue out any commission for the examination of any witnesses within the jurisdiction of the said Court; and any examiner appointed by any order of the Court shall have the like power of administering oaths as commissioners now have under commissions issued by the Court for the examination of witnesses."³

The 36th section enabled parties to give evidence by affidavit, in certain cases, when they had elected that the general evidence in the cause, should be taken orally. This section is superseded by the General Orders of January, 1855.⁴

We have seen that the parties are now enabled to adduce their evidence either wholly or partially by affidavit, or orally at their discretion; and as in very many cases it is more convenient and less expensive to adopt the method of proceeding by affidavit, the result is, that a large portion of the evidence in suits in Chancery will henceforward be adduced in this form. It will be convenient here to set forth the other Orders of January, 1855, which prescribe the time for closing the evidence, and some other particulars. By the 5th Order it is directed, —

V. The evidence on both sides in any cause to be used at the hearing thereof, whether taken upon affidavit or orally (and including the cross-examination and re-examination of any witness or witnesses), is to be closed within eight weeks after issue joined therein, except that any witness who has made an affidavit in-

¹ Under the amendment of the 67th Equity Rule of the United States Courts, made March 17, 1862, when the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the Court, to be there filed of record in the same mode as prescribed in the 30th section of the Act of Congress, Sept. 24, 1789. The duty of examiners to transmit depositions and examinations to the clerk of the Court, is fixed in New Jersey by Rule XIII. § 4.

² See, for the amount to be paid, the next Chapter on Costs and Fees. It appears that this section only applies to evidence taken for the hearing; if it is intended for an interlocutory motion, the examiner may return the depositions as fast as they are taken; *Clark v. Gill*, 1 Kay & J. 19.

³ See the cases cited on p. 889.

⁴ Ante, p. 888; *Crofts v. Middleton*, 9 Hare, Appx. 18, 175.

tended to be used by any party to such cause at the hearing thereof shall be subject to cross-examination within one month after the expiration of such period of eight weeks.

VI. No affidavit or deposition filed or made before issue joined in any cause shall, without special leave of the Court, be received at the hearing thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the Court, notice in writing shall have been given by the party intending to use the same, to the opposite party, of his intention in that behalf.

VII. In suits in which issue shall have been joined when these Orders take effect, the evidence to be used at the hearing of the cause shall be taken according to the present practice of the Court, unless the parties shall consent, or the Court shall order, that the same shall be taken in the altered mode prescribed by these Orders.

VIII. All affidavits, whether to be used at the hearing of a cause, or on any other proceeding before the Court, are to state distinctly what facts or circumstances deposed to are within deponent's own knowledge, and his means of knowledge, and what facts or circumstances deposed to are known to or believed by him by reason of information derived from other sources than his own knowledge, and what such sources are.

IX. The costs of affidavits not in conformity with the preceding Order are to be disallowed on taxation, unless the Court should otherwise direct.

X. These Orders shall be deemed to apply as nearly as may be to evidence taken after the hearing of a cause, as well as to evidence taken previously, and with a view to such hearing.

XI. These Orders shall take effect on and after the 21st day of January, 1855.

The statute then proceeds to relate the manner in which evidence is to be adduced in a cause by affidavit: —

By the 37th section, "Every affidavit to be used in the said Court shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and, as nearly as may be, shall be confined to a distinct portion of the subject."

By the 38th section, "The evidence on both sides in any suit in the said Court, whether taken orally or upon affidavit, shall be closed within such time or respective times after issue joined, as

shall in that behalf be prescribed by any General Order¹ of the Lord Chancellor, but with power to the Court to enlarge the same as it may see fit; and after the time fixed for closing the evidence no further evidence, whether oral or by affidavit, shall be receivable, without special leave of the Court previously obtained for that purpose: provided always, that any witness who has made an affidavit filed by any party to a cause shall be subject to oral cross-examination within such time after the time fixed for closing the evidence as shall be prescribed in that behalf by any order of the Lord Chancellor, by or before an examiner, in the same manner as if the evidence given by him in his affidavit had been given by him orally before the examiner, and after such cross-examination may be re-examined orally by or on the part of the party by whom such affidavit was filed; and such witness shall be bound to attend before such examiner to be so cross-examined and re-examined, upon receiving due and proper notice, and payment of his reasonable expenses, in like manner as if he had been duly served with a writ of *subpœna ad testificandum* before such examiner; and the expenses attending such cross-examination and re-examination shall be paid by the parties respectively, in like manner as if the witness so to be cross-examined were the witness of the party cross-examining, and shall be deemed costs in the cause of such parties respectively, unless the Court shall think fit otherwise to direct.”

By the 39th section, “Upon the hearing of any cause depending in the said Court, whether commenced by bill or by claim, the Court, if it shall see fit to do so, may require the production and oral examination before itself of any witness or party in the cause, and may direct the costs of and attending the production and examination of such witness or party, to be paid by such of the parties to the suit or in such manner as it may think fit.”²

By the 40th section, “Any party in any cause or matter depending in the said Court may, by a writ of *subpœna ad testificandum* or *duces tecum*, require the attendance of any witness before an examiner of the said Court, or before an examiner specially appointed for the purpose, and examine such witness orally, for the purpose of using his evidence upon any claim, motion, petition, or other proceeding³ before the Court, in like manner as such wit-

¹ See preceding page, Order V.

² *May v. Biggenden*, 1 Sm. & Gif. 133.

³ See *Wigan v. Rowland*, 10 Hare, Appx. 18; *Williams v. Williams*, 17 Beav. 156. When served with a *subpœna duces tecum*, the witness must attend before

ness would be bound to attend and be examined with a view to the hearing of a cause ; and any party having made an affidavit to be used or which shall be used on any claim, motion, petition, or other proceeding before the Court, shall be bound on being served with such writ to attend before an examiner, for the purpose of being cross-examined : ¹ Provided always, that the Court shall always have a discretionary power of acting upon such evidence as may be before it at the time, and of making such interim orders, or otherwise, as may appear necessary to meet the justice of the case."

By the 41st section, "In cases where it shall be necessary for any party to any cause depending in the said Court to go into evidence subsequently to the hearing of such cause, such evidence shall be taken as nearly as may be in the manner hereinbefore provided with reference to the taking of evidence with a view to such hearing."

In addition to these statutory directions, the following General Orders of August, 1852, are material : —

XXXIII. No affidavit filed before issue joined in any cause shall be received or receivable at the hearing thereof, unless within one month after issue joined notice in writing shall have been given by the party intending to use the same, to the opposite party, of his intention in that behalf.

XXXIV. Any party desiring to cross-examine a witness who has made an affidavit in any cause intended to be used at the hearing thereof, shall give forty-eight hours' notice to the party on whose behalf such affidavit was filed, or to the party intending to use the same, of the time and place of such intended cross-examination, in order that such party may, if he shall think fit, be present at such cross-examination.

XXXV. The re-examination of any such witness is immediately to follow his cross-examination, and is not to be delayed to a future period.

the examiner and produce the instrument required, unless he has some legal or reasonable excuse for withholding it. Upon trials in Courts of Law, the Court and not the witness is the judge of the validity of the objection. *Amey v. Long*, 9 East, 473 ; *Bull v. Loveland*, 10 Pick. 9. In Courts of Equity, the validity of the objection is considered, upon the witness being brought up, on an attachment for refusing to produce the instrument. *Bradshaw v. Bradshaw*, 3 Sim. 285. See *M'Pherson v. Rathbone*, 7 Wendell, 216 ; *Jackson v. Denison*, 4 Wendell, 558.

¹ See *Normanville v. Stanning*, 10 Hare, Appx. 20.

XXXVI. Any party in any cause or matter requiring the attendance of any witness before an examiner, for the purpose of his being examined or cross-examined, with a view to his evidence being used upon any claim, motion, petition, or other proceeding before the Court, not being the hearing of a cause, shall give to the opposite party or parties forty-eight hours' notice at least of his intention to examine such witness, and of the time and place of such examination, unless the Court shall in any case think fit to dispense with such notice.

XXXVII. And where it is desired to cross-examine any party, whether a party to the cause or matter or not, who has made an affidavit to be used, or which shall be used on any claim, motion, petition, or other proceeding before the Court, not being the hearing of a cause, the party desiring so to cross-examine such deponent shall give such notice to the opposite party as is required by Order XXXIV. with reference to the cross-examination of a witness who has made an affidavit to be used on the hearing of a cause.

XXXVIII. All the above Orders with reference to the examination, cross-examination, and re-examination of witnesses, shall extend and be applicable to evidence taken in any cause subsequently to the hearing thereof.

XXXIX. In suits in which issue shall have been joined when these Orders come into operation, the evidence to be used at the hearing of the cause shall be taken according to the existing practice of the Court, unless the parties shall consent, or the Court shall order, that the same shall be taken in the mode prescribed by the Act 15 & 16 Vict. c. 86, and these Orders.

Having stated the recent statutes and Orders on the mode of adducing evidence in the Court of Chancery, it will be convenient to say a few words on the manner in which these regulations are practically carried into effect. In the first place, as we have seen, all persons, whether parties to the suit or not, are capable, and indeed compellable, to give evidence. No order is now necessary for the examination of a party.¹ Neither does a plaintiff affect his right to a decree against a defendant, by making him a witness, as was the case until recently.² Moreover, it is now enacted by the 16 & 17 Vict. c. 83, s. 1, "That on the trial of any issue joined,

¹ *Swann v. Wortley*, 9 Hare, 460.

² *Harford v. Rees*, 9 Hare, Appx. 70; and see ante, p. 882.

or of any matter or question, or on any inquiry arising on any suit, action, or other proceeding in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the person in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding." By the 3d section, "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."¹

Neither the husband or the wife are, however, either competent or compellable to give evidence against each other in any criminal proceeding, or in any proceeding instituted in consequence of adultery.²

Moreover, as we have seen, no persons are now ineligible as witnesses by reason of infancy, or on the ground of having been convicted of any crime.

It is, of course, competent to either party to discredit the witnesses of his opponent; and by the Common Law Procedure Act,³ the manner in which he may so discredit either his own witnesses, or the witnesses of his adversary, has been recently laid down, and is made applicable to suits in Equity, as well as proceedings at Common Law. It will be most convenient to set forth the sections of the statute bearing upon the subject. They are as follows:—

By section 22, "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the Judge prove adverse, contradict him by other evidence, or, by leave of the Judge, prove that he has made at other times a statement in-

¹ In Massachusetts, in cases where the wife is a party or one of the parties, she and her husband shall be competent witnesses for and against each other, but they shall not be allowed to testify as to private conversations with each other. Genl. Sts. c. 131, § 14.

² Such is the rule in Massachusetts. Genl. Sts. c. 131, § 14.

³ 17 & 18 Vict. c. 125.

consistent with his present testimony ;¹ but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.”²

23. “If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it ; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.”³

24. “A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him ; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him : provided always, that it shall be competent for the Judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit.”

25. “A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies the fact, or refuses to answer, it shall be lawful for the opposite party to prove such conviction ; and a certificate containing the substance and effect (only omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the Court, or other officer having the custody of the records of the Court where the offender was convicted, or by the deputy of such clerk or officer,

¹ See Stark Ev. (8th Am. ed.) 215 *et seq.* and notes ; 1 Greenl. Ev. § 443, 444.

² Buckley v. Cooke, 1 Kay, 29.

³ See 1 Stark. Ev. (8th Am. ed.) 210 to 214, and notes. In Massachusetts, a witness may be impeached by evidence of his previous contradictory statements without first calling his attention to those statements. Tucker v. Welsh, 17 Mass. 160 ; Gould v. Norfolk Lead Co. 9 Cushing, 338 ; Commonwealth v. Hawkins, 3 Gray, 463.

(for which certificate a fee of five shillings and no more shall be demanded or taken,) shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same."

It has always been the rule that witnesses resident within twenty miles of London should be examined at the Examiner's Office. This rule still prevails. If witnesses resident at a greater distance make no objection, they can also be examined at the same place, but they cannot be compelled to come up to London from a greater distance. A special examiner may be appointed for the examination of witnesses in the country;¹ or, in urgent cases, where there is a difficulty of obtaining an appointment in the Examiner's Office, a special examiner may be appointed for witnesses within the London district.²

The examiner is furnished with a copy of the bill and answer, and makes an appointment for the attendance of witnesses, according to his other engagements for a similar purpose. Notices for the attendance of witnesses at the time appointed are signed by the examiner, or the special examiner, as the case may be, which notices are served upon the witnesses.

Where there is reason to suppose a witness will not voluntarily attend to be examined, recourse must be had to the compulsory process of a writ of *subpœna ad testificandum*, which commands the witness to whom it is directed to appear before the examiner to testify on behalf of the party requiring his testimony.³

¹ Reed v. Prest, 1 Kay, Appx. 14; or out of the jurisdiction, Crofts v. Middleton, 9 Hare, Appx. 18.

² Brennan v. Preston, 10 Hare, Appx. 17; Pillan v. Thompson, 10 Hare, Appx. 70.

³ Hind. 326. See 78th Equity Rule of the United States Courts, by which it is provided that witnesses who live within the district, may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a Master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the Clerk in blank, and filled up by the party praying the same, or by the commissioner, Master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in Court. The compulsory attendance of witnesses before the examiner is provided for in New Jersey, by Chancery Rule XIII. § 5, and under this rule the names of any number of witnesses may be inserted in the subpœna.

The form of this is prescribed by the Orders of May, 1845, and is as follows : —

“ *Victoria, &c.*

“ *To —, greeting.*

“ *We command you, [and every of you,] that, laying all other matters aside, and notwithstanding any excuse, you personally be and appear before Mr. —, one of the examiners of witnesses in our High Court of Chancery, at his office in Rolls' Yard, Chancery Lane, London, at such times as the bearer hereof shall, by notice in writing, appoint, [or before E. F. or G. H., Commissioners appointed for the examination of witnesses in our Chancery, at such times and places as the bearer hereof shall by notice in writing appoint,] to testify the truth, according to your knowledge, in a certain cause depending in our said Court of Chancery, wherein A. B. [and others, or another, are or] is plaintiff [or plaintiffs], and C. D. [and others, or another, are or] is defendant [or defendants], on the part of the — ; [in case of subpœna duces tecum, add, and that you then and there bring with you and produce, &c.] and hereof fail not at your peril.”*

In case the witness is required to bring with him any written document in his possession, then the writ must be a *subpœna duces tecum*, which is in the same form as the ordinary subpœna, except that, before the words “*and hereof fail not at your peril,*” the words “*and that you then and there bring with you and produce*” the documents required are inserted.¹

Every subpœna, other than a *subpœna duces tecum*, must contain three names, where necessary or required ;² and no more than three persons can be included in one *subpœna duces tecum* ; but the party suing out the same is at liberty to sue a subpœna for each person, if it shall be deemed necessary or desirable to do so.³ It is to be observed, that in a case of a subpœna of this nature, husband and wife are considered as two distinct persons, and that her christian and surname must be inserted accordingly.⁴

The name or firm, and the place of business or residence, of the solicitor or solicitors issuing the subpœna, must be indorsed in manner before stated with respect to other writs.⁵

¹ Order of May, 1845, Appx. As to the degree of particularity with which the documents must be described, see *Attorney-General v. Wilson*, 9 Sim. 526.

² 5th Order, 1833.

³ 6th Order, 1833.

⁴ Hind. 327.

⁵ See ante.

The costs of an ordinary *subpœna ad testificandum* and *præcipe* are the same as those of a *subpœna ad respondendum* and *præcipe*.¹ Where it is a *subpœna duces tecum*, the sum of 12s. 6d. is to be allowed in costs for every such subpœna, including the præcipe, attendance, and sum paid for sealing the same.²

The service of a subpœna, except a subpœna for costs, is to be of no validity if not made within twelve weeks after the date of the writ; and "in the interval between the suing out and service, the party suing out the same may correct any error in the names of parties or witnesses, and may have the writ resealed, upon payment of a fee of one shilling, and at the same time leaving a corrected præcipe of such subpœna, marked 'Altered and resealed,' and signed with the name and address of the solicitor or solicitors suing out the same."³

The service of this subpœna must in all cases be personal, and is effected by delivering a copy of the writ and of the indorsement thereon to the witness, and showing him the original writ. At the same time that he is served with the writ, the witness should be served with a notice in writing, specifying the time when he is to attend the examiner in pursuance of it.

The time fixed by this notice should be a reasonable one; and it is to be observed, that no witness is bound to attend, unless his reasonable expenses are paid or tendered to him, except he reside within the bills of mortality, and is summoned to give evidence within the same; nor, if he appears, is he bound to give evidence until such charges are actually paid him.⁴

It is said, that, if the witness whose attendance is required be a married woman, it will be necessary to serve the subpœna upon her personally, and that the tender of the expenses should be made to her, and not to her husband.

If the witness, upon being served with the subpœna and notice in the manner stated, neglect or refuse to attend to be examined, it would appear, from the old practice, that the proper course would be to obtain a certificate from the examiner that the witness had not attended, and that thereupon and upon an affidavit of the personal service of the subpœna on the witness, an application should be made to the Court, that the witness do, at his own ex-

¹ Ante.

² 6th Order, 1833.

³ 25th Order, May, 1841.

⁴ See Mercer's Case, 5 De G., Mac. & Gor. 26.

pense, attend and be sworn and examined in four days, or that he may stand committed to the Queen's Prison.¹

This order being drawn up, passed and entered, a copy of it must be served upon the witness personally, the original order being shown at the same time. And if the witness deliberately persists in his neglect or refusal to attend, an affidavit of the service of the order must be made and filed; and another certificate obtained from the examiner, that the witness has not attended. The Court then, upon a further application, will make an order for the commitment of the witness to the Queen's Prison. This order, when drawn up, passed and entered, must be delivered to the tipstaff attending the Court, who will procure a warrant from the Lord Chancellor's secretary, and will then apprehend and convey him to the keeper of the Queen's Prison, where he must remain in custody until he has been examined and paid the fees.

When a witness served with a *subpœna duces tecum* refused to produce the document mentioned in the writ when required, he was ordered, upon special motion, to attend again and produce it, and to pay the plaintiff all the costs occasioned by the refusal.²

If the witness be in prison within twenty miles of the metropolis, his situation must be represented to the examiner, who, according to the old practice, will fix a day for attending at the prison to swear and examine the witness; and a notice in writing, specifying the title of the cause, the name and place of confinement of the witness, and the party's intention of examining the witness on the day fixed, must then be served on the adverse solicitor, two days previously to the examination of the witness, in order to give the adverse party an opportunity of cross-examining such witness, if he is so advised.³

In like manner, if a witness, residing within twenty miles of London, be incapable, by reason of sickness, of attending at the Examiner's Office to be examined, the examiner may go to the place of the witness's residence and administer the oath and take the deposition of the witness,⁴ notice of the name and place of

¹ See 78th Equity Rule of the United States Courts; ante, 891.

² *Bradshaw v. Bradshaw*, 1 R. & M. 208.

³ Before the Stat. 3 & 4 Will. 4, c. 94, it was necessary that the Master should go to the prison, as well as the examiner, for the purpose of administering the oath. Hind. 330.

⁴ An order for this purpose seems to be necessary. See *Anon.* 4 Mad. 463. *Sed quare*, if the examiner is willing to go without an order?

abode of the witness, and of the day and place where the witness is intended to be examined, and on whose behalf, having been served upon the opposite party, in the manner before pointed out, two days previous to the day fixed for the examination of the witness, in order to give the other side an opportunity for cross-examining him.¹

By the 14 & 15 Viet. c. 99, s. 16, Every court, judge, justice, officer, commissioner, arbitrator or other person, now or hereafter having, by law or by consent of parties, authority to hear, receive and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.

Where the witness is a Christian, the oath is, in ordinary cases, administered upon the Holy Evangelists ;² where the witness is a Quaker or Moravian, or comes within any other denomination of dissenters, who are allowed to give evidence upon their solemn affirmation instead of upon oath, an affirmation is substituted for the oath.³

Persons not professing the Christian religion may be sworn according to the peculiar ceremonies of their own religion.⁴ It is presumed, however, that a previous order will be necessary to warrant a departure from the ordinary practice.

It is to be notice, that a peer, although privileged to put in his answer upon his attestation of honor, must, when called upon to give evidence as a witness, do so upon oath.

¹ Hind. 331.

² In Massachusetts, the oath is ordinarily administered, with the ceremony of holding up the hand. Genl. Sts. c. 131, § 8. But where the witness is a Roman Catholic, the oath is administered to him on the Holy Evangelists, on the ground that those who profess that faith, generally regard this to be the most solemn form of administering an oath. *Commonwealth v. Buzzell*, 16 Pick. 153. So in any case where the Court or magistrate before whom a person is to be sworn, is satisfied that such person has any peculiar mode of swearing which is in his opinion more solemn or obligatory than holding up the hand, they may adopt that mode of administering the oath. Genl. Sts. c. 131, § 9.

³ In Massachusetts, every person who declares that he has conscientious scruples against taking an oath, shall, when called upon for that purpose, be permitted to affirm in the manner prescribed for Quakers, if the Court or magistrate on inquiry is satisfied of the truth of such declaration. Genl. Sts. c. 131, § 10, 11. Conscientious scruples furnish ground for substituting an affirmation for an oath in the United States Courts. Rule 91, of the Equity Rules for U. S. Courts.

⁴ Phil. & Amos, 10. Such is the law by statute of Massachusetts. Genl. Sts. c. 131, § 12.

By the 20th section of the Common Law Procedure Act,¹ 1854, "If any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the Court or Judge or other presiding officer, or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following, that is to say: I, A. B., do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief unlawful; and I do also solemnly, sincerely, and truly affirm and declare, &c.; which solemn affirmation and declaration shall be of the same effect and force as if such person had taken an oath in the usual form."²

We have seen that after the examination is over, the original depositions, authenticated by the signature of the examiner, are transmitted to the Record Office of the Court, to be there filed, and any party to the suit may obtain a copy of them. The fees and costs in the Examiner's Office will be found in the chapter on that subject. We have also seen the manner in which a witness may protect himself by demurrer, from answering any question to which he has a valid legal objection.

Until very recently the established rule of the Court of Chancery was, that evidence could not be given by affidavit on the hearing of a cause. This rule was subject to the trifling exceptions mentioned previously.³ It was otherwise upon interlocutory applications. Although questions of the greatest importance were often decided in that form, yet not only was evidence by affidavit always admissible, but it was the only species of evidence permitted. By the Chancery Amendment Act a material change was made, and it was permitted to the parties, on mutual consent, after notice given, to adduce their evidence by affidavit. The result has proved so satisfactory, that by recent Orders⁴ either side, without the consent of the other, may adduce the whole or any part of their evi-

¹ Ante, p. 898.

² In Massachusetts, "Every person not a believer in any religion shall be required to testify truly under the pains and penalties of perjury; and the evidence of such person's disbelief in the existence of God, may be received to affect his credibility as a witness." Genl. Sts. c. 131, § 12.

³ Ante, p. 877.

⁴ Ante, p. 893.

dence by affidavit. In a town cause, when all the witnesses can attend and give their evidence *vivâ voce* before the examiner, the diminution of expense will not be material, but in the great majority of cases it will be found far more convenient and less expensive that a part at least of the evidence should be by affidavit. With respect to the form of affidavits, little more need be said. They are entitled in the cause, are drawn up in the first person, and are divided into paragraphs. In practice they very often contain much that is not strictly legal evidence. It is not, however, the custom of the Courts to reject an affidavit because a part of it consists of mere hearsay or immaterial matter. They are generally left to the Court in confidence that the Judge will only pay attention to that part which is legal evidence. This habit has produced considerable laxity in the framing of affidavits, but it cannot be said that this laxity has led to much, if any, practical inconvenience.¹

Affidavits may be sworn in any part of the country, before persons regularly authorized for this purpose. A recent Act, 16 & 17 Vict. c. 78, has increased the number and defined the authorities of these persons. It will be convenient to set forth some of its provisions.

By the 1st section, "The persons now styled 'Masters Extraordinary in Chancery' shall cease to be so styled, and they and all persons hereafter appointed by the Lord Chancellor to execute like duties in England shall be designated 'Commissioners to administer Oaths in Chancery in England,' and shall possess and exercise all such powers and discharge all such duties as now appertain to the office of Master Extraordinary in Chancery by virtue of any statute or order of the Court of Chancery or of the Lord Chancellor, or usage in that behalf, or otherwise."

Moreover, with respect to the London districts, it is enacted by the 2d section, that "It shall be lawful for the Lord Chancellor, from time to time, to appoint any persons practising as solicitors within ten miles from Lincoln's-Inn Hall at their respective places of business, to administer oaths and take declarations, affirmations, and attestations of honor in Chancery, and to possess all such other powers and discharge all such other duties as aforesaid; and such persons shall be styled 'London Commissioners to administer Oaths in Chancery'; and they shall be entitled to charge and take a fee of one shilling and sixpence for every oath administered by

¹ See, however, the recent Order as to the form of affidavits, ante, p. 894.

them, and for every declaration, affirmation, or attestation of honor taken by them, subject to any order of the Lord Chancellor varying or annulling the same."

By the 3d section, "It shall be lawful for the Lord Chancellor, from time to time, to appoint any persons practising as solicitors in the Isle of Man, in the Channel Islands, or any of them, to administer oaths and take declarations, affirmations, and attestations of honor in Chancery, and to possess all such other powers and discharge all such other duties as aforesaid; and such persons shall be styled 'Commissioners to administer Oaths in Chancery for the Channel Islands,' and they shall be entitled to charge and take the same fees as the said 'Commissioners to administer Oaths in Chancery.'"¹

By the 5th section, "Nothing herein contained shall abridge or lessen the power of the Lord Chancellor as it now exists to appoint fit persons to administer oaths and take declarations, affirmations, and attestations of honor in Chancery, or to regulate the fees to be taken by them; and where any Act of Parliament refers to the Masters Extraordinary in Chancery, or to their powers or duties, the reference shall be held to apply to and include the commissioners hereinbefore mentioned, or to their powers or duties, as the case may be."

Moreover, it will be recollected, that with respect to all places out of the jurisdiction of the Court but within the Queen's dominions, such affidavits may be sworn before "any judge, court, notary public, or person lawfully authorized to administer oaths in the place; and, with respect to places out of the Queen's dominions, they may be sworn before any consul or vice-consul."²

We have also seen that witnesses deposing by affidavit are made, by the Act of Parliament, subject to regular oral cross-examination,³ and provisions are also made for their re-examination.

The expenses attending such cross-examination or re-examination are also provided for by the Act of Parliament.

With respect to the closing of the evidence, we have seen⁴ that

¹ *Re Record and Writ Clerks*, 3 De G., Mac. & Gor. 723. Neither the solicitor in the cause, nor his clerk, can act as a commissioner, *Hopkin v. Hopkin*, 10 Hare, Appx. p. 2.

² See 15 & 16 Vict. c. 86, § 22, ante, p. 753; *Baillie v. Jackson*, 3 De G., Mac. & Gor. 38.

³ See ante, p. 893 *et seq.*

⁴ Ante, p. 892.

eight weeks after issue joined is the regular time for closing the evidence, and that a witness who has made an affidavit is subject to cross-examination within one month or twenty-eight days after the expiration of such eight weeks.¹

The Court is, however, specially authorized to enlarge the time for closing evidence, if it shall think fit to do so.² Such an application will be usually heard and settled in chambers, but if opposed may be adjourned to open Court.³

It may be here mentioned, that parties are now enabled, in most cases, to obtain copies of affidavits filed on behalf of other persons in the cause, without being at the expense of taking office copies. The Orders of October, 1852, under which this practice originated, will be set out at length in the Chapter on Costs and Fees; but it may be convenient here to mention, that by the second of those Orders, "The party or his solicitor requiring any copy, save as in the said Order before excepted, is to make a written application to be delivered to the party by whom the copy is to be furnished, or his solicitor, with an undertaking to pay the proper charges."

PART IV. — METHOD OF EXAMINING WITNESSES BY INTERROGATORIES IN WRITING.

SECTION I. — *Of Interrogatories.*

THE general mode of examining witnesses in Equity in England formerly was by interrogatories in writing, exhibited by the party, plaintiff or defendant, or directed by the Court to be proposed to or asked of the witness in a cause touching the merits thereof or some incidents therein. The practice is now however almost entirely abolished in that country; but, as it may still be resorted to with respect to any particular witness within the jurisdiction of the Court, and with respect to all witnesses in the cause out of the jurisdiction of the Court,⁴ and as it continues to prevail in some

¹ See ante, 893, note.

² Ante, p. 894; *Hope v. Threlfall*, 17 Jur. 1020.

³ See 15 & 16 Vict. c. 86, § 26.

⁴ Ante, 887.

Courts in the United States, it is proper here to consider and state the rules by which it is governed. These interrogatories are questions in writing, adapted to sustain the case made by the party exhibiting them, and are administered to the witnesses either by the regular examiners of the Court, or through the medium of commissioners specially appointed for the purpose.¹ They are termed *original*, when exhibited on the part of the person who produces the witness; or *cross* interrogatories, if filed on behalf of the adverse party, to examine a witness produced on the other side.²

Interrogatories should be short and pertinent, and necessarily they must not be leading.³ If they are leading, the deposition taken thereon will be suppressed; and so it will be where the interrogatories are too particular, and point to one side of the question more than the other.⁴

¹ Hind. 317.

² Ibid.

³ As to the forms of interrogatories, see Gresley Eq. Ev. (Am. ed.) 44 to 48. Leading questions are those which suggest to the witness the answer desired. See 1 Greenl. Ev. § 434, 435; 1 Stark. Ev. 149; 1 Phil. Ev. (Cowen & Hill's ed. 1839,) 268 to 272, and notes referred to; *Parkin v. Moore*, 7 Car. & Payne, 408. In some cases leading questions are permitted, even in a direct examination; namely, where the witness appears to be hostile to the party producing him, or in the interest of the other party, or unwilling to give evidence; or where an omission in his testimony is evidently caused by want of recollection, which a suggestion may assist. Thus where the witness stated, that he could not recollect the names of the component members of a firm, so as to repeat them, without suggestion, but thought he might possibly recollect them if suggested to him, this was permitted to be done. So where the transaction involves numerous items or dates. So where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry, without a particular specification of it. So where a witness is called to contradict another, who has testified to particular expressions, the contradicting witness may be asked whether such expressions were used. When and under what circumstances a leading question may be put, is a matter resting in the sound discretion of the Court, and not a matter which can be assigned for error. 1 Greenl. Ev. § 435; *Clarke v. Saffery*, Ry. & M. 126, per Best C. J.; *Regina v. Chapman*, 8 Car. & Payne, 558; *Acerro v. Petroni*, 1 Stark. 100; 2 Phil. Ev. 404, 405; *Moody v. Rowell*, 17 Pick. 498.

⁴ 1 Harr. Ed. Newl. 259. Objections to interrogatories, filed before the issuing of a commission to take a deposition, should specify the ground of the objection, in order that the adverse party may have an opportunity to vary the interrogatories. *Allen v. Babcock*, 15 Pick. 56. See *Craddock v. Craddock*, 3 Litt. 77; *Jones v. Lucas*, 1 Rand. 268. A leading interrogatory in a deposition, taken when both parties are present, must be objected to at the time it is put to the witness, if at all. *Woodman v. Coolbroth*, 7 Greenl. 181; *Sheeler v. Spear*, 3 Binn. 130. See *Anon.* 2 Pick. 165.

Leading questions are such as instruct a witness how to answer on material points, such as, "*Did you not see or do such a thing?*"¹ or which, embodying a material fact, admit of an answer by a simple negative or affirmative, though the question does not suggest which.² "Such questions, as well as those which fall more directly under the denomination of leading questions, are objectionable, because the evidence elicited by them is presented to the Court, which is to judge of the effect of it, not as it would be if it were the unassisted testimony of the witness, but in the form, and with the coloring, that are prompted by professional skill and a previous knowledge of the case which it is desired to prove. If such a mode of proof were admitted, there would not be the same probability that a witness would state the whole transaction, and part only might be elicited; the chance too, of detecting discrepancies in perjured or mistaken testimony would be diminished; nor are those objections removed by the power of cross-examination, which, as it often must be conducted without previous knowledge of the answers which the witnesses will give, is not a counterbalance to the facility afforded of presenting a selected portion of the evidence in chief."³

It is to be observed, that, in order to render an interrogatory objectionable, on the ground of its being leading, it must relate to some material point in the cause. "Questions which are intended merely as introductory, and which, whether answered in the affirmative or negative, would not be conclusive on any of the points in the cause, are not liable to the objection of leading. If it were not allowed to approach the points in issue by such questions, the examination of witnesses would run to an immoderate length. For example, if two defendants are charged as partners, a witness may be properly asked whether the one defendant has interfered in the business of the other."⁴

It is difficult, however, to suggest any rules, in the abstract, with regard to what will or will not be considered as a leading question, as much, in every case, must depend upon the peculiar circumstances attending it; nevertheless, the avoiding such ques-

¹ See *Craddock v. Craddock*, 3 Litt. 77.

² 1 Harr. Ed. Newl. 259; see also *Phil. & Amos*, 886; *Lincoln v. Wright*, 4 Beav. 166.

³ *Phil. & Amos*, 887.

⁴ *Ibid.*

tions as may be considered leading, is a point very important to be attended to in the framing of interrogatories, as the consequences of them may be a motion to suppress the evidence taken upon them, whereby the party will, in all probability, be deprived of an important part of the evidence upon which he intends to rely. Indeed, it seems that, where interrogatories are obviously leading, the Court will, without any motion being made to suppress the deposition, think it a good ground to reject the evidence taken upon it at the hearing.¹ It may be observed, however, that where depositions are offered in evidence in a trial at Law, they may be read notwithstanding the interrogatories on which they were taken are leading; — the other side ought to have applied to the Court in which they were taken to have them suppressed.²

Cross-interrogatories are not subject to the same objections, on account of their leading the witness, as interrogatories for examination in chief; care must be taken, however, in framing them, not to adapt them to the proof of new facts which it is not likely the party examining in chief will attempt to substantiate by his evidence; for, although the adverse party may cross-examine as to the points upon which a witness has been examined in chief, he cannot make use of the same process to prove a different fact.³ If, therefore, there should be any parts of a case which can only be proved by a witness examined on behalf of the adverse party, the proper course is, not to endeavor to establish them by cross-examining that witness, but to exhibit original interrogatories for the examination of such witness in chief; otherwise there will be a risk that the evidence of witness, as to those points, will be lost; for, if the reading of the deposition of the witness to the cross-interrogatory be objected to at the hearing as involving new points, the other party may also prevent the reading of the cross-deposition by refusing to read the examination in chief.⁴

Interrogatories, like all other proceedings in the Court, may be the subject of a reference for scandal.⁵ It seems, however, that

¹ *Delves v. Lord Bagot*, 2 Fowl. Ex. Pr. 129.

² 4 Maule & Sel. 497. For the method of suppressing depositions, see post.

³ *Dean and Chapter of Ely v. Stewart*, 2 Atk. 44.

⁴ *Smith v. Biggs*, 5 Sim. 392. See 1 Greenl. Ev. § 445 *et seq.*; 1 Phil. Ev. (Cowen & Hill's ed. 1839,) 272 *et seq.* and notes referred to; *Gresley Eq. Ev.* (Am. ed.) 49.

⁵ *Cox v. Worthington*, 2 Atk. 236.

they cannot be referred for impertinence alone.¹ If the witness himself objects to the interrogatory upon this ground, he should do so, by demurrer, before he answers it.²

Interrogatories for the examination of witnesses in a cause are entitled, "*Interrogatories to be exhibited to witnesses to be produced, sworn and examined in a certain cause now depending and at issue in the High Court of Chancery, wherein A. B. is plaintiff, and C. D. is defendant, on the part and behalf of the above-named plaintiff,*" (or defendant, as the case may be.) Care must be taken, in framing the interrogatories, that the title of the cause³ is properly set out, as any mistake in this particular may be fatal to the depositions. Thus, where the plaintiff's christian name was mistaken in the title of the interrogatories, the depositions could not be read, nor would the Court permit the title to be amended, though most of the witnesses had, since their examination, gone to sea.⁴ The reason of requiring this particularity, in the title, is the impossibility there would be of maintaining an indictment for perjury, if such variance between the title of the cause and that of the interrogatories should appear.

It is usual to prefix to all interrogatories, a general inquiry "as to the witness's knowledge of the parties, and the time when the witness first became acquainted with each," &c. Orders appear to have formerly been promulgated by the Court, to restrict this practice, by which it is directed "that the articles which are usually thrust into the beginning of every schedule of interrogatories, as it were of form or course, touching the witness's knowledge of the parties, plaintiffs or defendants, of the lands, towns, and places in the pleadings, and the like, be not so needlessly used as they are;"⁵ but, notwithstanding this order, the practice of introducing a general inquiry of this nature, is almost invariably resorted to.⁶

The interrogatories are broken into distinct interrogatories, according to the subject-matter or the witnesses to be examined, but each interrogatory concludes with the following words: — "*De-*

¹ *White v. Fussell*, 19 Ves. 113; see *Pyncent v. Pyncent*, 3 Atk. 557.

² *Jeffris v. Whittuck*, 2 Pri. 486; but see *Ashton v. Ashton*, 1 Vern. 165; 1 Eq. Ca. Ab. 41, S. C.

³ *Jones v. Smith*, 2 Y. & C. 42; *Lincoln v. Wright*, 4 Beav. 166; *Pritchard v. Foulkes*, 2 Beav. 133.

⁴ *White v. Taylor*, 2 Vern. 435.

⁵ Beames's Ord. 71.

⁶ *Gresley Eq. Ev. (Am. ed.)* 48, 49

clare the truth of the several matters in this interrogatory inquired after, according to the best of your knowledge, remembrance, and belief." These words, however, are mere matter of form, and are not generally inserted in the draft, but are supplied in the engrossment.

It has frequently happened, that, in framing the interrogatories, some point to which it is important that a witness should depose, has been omitted ; or else it has been found that a witness is capable of deposing as to some matter as to which it was not, at the time; known that any witness could speak, in consequence of which, evidence which would be important to the party would be omitted, from the circumstance of no question being addressed to the witness calculated to elicit it ; it therefore became the practice to add to each set of interrogatories a general interrogatory calling upon the witness to state *whether he knew or could set forth any matter or thing which might in anywise tend to the benefit or advantage of the party for whom he appeared, other than what he had been interrogated to ?* And the witness, being examined upon this interrogatory, then stated whatever matter he had to prove, to which no special interrogatory had been addressed. This form has, however, been altered ; and now, by the 32d Order, of December, 1833, it has been directed, "that the last interrogatory now commonly in use be in future altered, and shall stand and be in the words or to the effect following :— '*Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination, or to the matters in question in this cause ?*' If yea, set forth the same fully and at large in your answer."¹

But although the Order directs where a general interrogatory of the nature of that formerly used as the last, is made use of, the form shall be that prescribed, it does not compel a party to use it.² So that it is optional with the draftsman to insert a general interrogatory or not. Where, however, he does insert one, it must be

¹ This last interrogatory is the same as that adopted by the Supreme Court of the United States in Rule 71 of the Equity Rules of that Court. See Gresley Eq. Ev. (Am. ed.) 49. It is a fatal defect if this general interrogatory does not appear to be answered. *Richardson v. Golden*, 3 Wash. C. C. 109 ; *Dodge v. Israel*, 4 Wash. C. C. 323.

² *Gover v. Lucas*, 8 Sim. 200.

in the form prescribed by the 32d Order, otherwise the deposition taken upon it may be suppressed upon motion.¹

The interrogatories being drawn and signed by counsel, must be copied upon parchment, and, if intended for the examination of witnesses in London, or within twenty miles of it, they must be left with one of the Examiners of the Court, which is termed *filing interrogatories*; ² but if any of the witnesses are to be examined by commission, the plaintiff should file, with the Examiner, such interrogatories only as apply to witnesses resident within the jurisdiction of the Examiner's Office.³

It is to be observed, that the practice is, to draw all the original interrogatories exhibited on behalf of one party in one set or schedule, leaving the selection of such as are proper for the particular witnesses to the solicitor,⁴ and where some of the witnesses of a party reside in London, and some in the country, it is necessary to have one set of interrogatories only drawn by counsel; and the solicitor, in procuring the same to be engrossed, distinguishes and copies those intended for the examination of town witnesses, separate from those intended for country witnesses.

If the interrogatories are to be exhibited in the Examiner's Office, and witnesses are examined thereon, either party may, without application to the Court or order for the purpose, exhibit one or more interrogatories, or a new set of interrogatories for the further examination of the same or other witnesses.⁵ But when a commission is taken out, the practice has been different. In *Campbell v. Scougal*,⁶ it appears to have been represented at the bar, that the practice in country causes in England, is to feed the Commissioners from time to time with interrogatories for the examination, as they can be presented either for original or cross-examination, until the Commissioners find that the supply of witnesses is exhausted; and although Lord Eldon observes that there was no doubt, that of late, interrogatories had been sent down into the country, from time to time, as often as prudence required and were returned, and that the Court had acted upon examination so taken and returned, yet his Lordship said the practice was not so formerly; and that he had frequently, when at the bar, drawn inter-

¹ *Gover v. Lucas*, 8 Sim. 200.

² 1 Turn. & V. 191.

³ *Ibid.*; Hind. 320, n.

⁴ See Beames's Ord. 71.

⁵ 1 Smith Ch. Pr. Ed. 1838, p. 354.

⁶ 19 Ves. 552.

rogatories guessing at what any witness to be examined to any fact in issue, could possibly represent, and that the interrogatories, both for the cross-examination and for the original examination of the defendants' witnesses, were prepared before the commission was opened: and notwithstanding the representation made at the bar, the practice of the Court appears to have been in conformity with his Lordship's recollection. Indeed it obviously must have been so, from the nature of the oath which was administered to the Commissioners, which was limited to the examination of witnesses upon the interrogatories — “*Now*” (*i. e.* at the time of administering the oath) “*produced and left with you.*”¹ This word “*Now*” has been left out of the oath hereafter to be administered to the Commissioner, under the 104th Order, of May, 1845; whether, therefore, hereafter new interrogatories may be exhibited before a commission remains to be seen.

Under the former practice, where additional interrogatories were required to be exhibited after the commission had been opened, an order for that purpose must have been obtained.²

It is to be observed, however, that notwithstanding a commission has been issued, and the parties have joined in it, and witnesses have been examined, new interrogatories may be exhibited into Court, (*i. e.* before the Examiner,) for the examination of new witnesses at any time before publication;³ but if a witness has been examined by Commissioners in the country, he cannot be examined again before the Examiner, without a special order.⁴

Interrogatories for the cross-examination of witnesses, differ very little in form from original interrogatories; they may be filed with the Examiner who examines in chief.⁵ Formerly this could not be done without a special order.⁶

¹ Post.

² *Carter v. Draper*, 2 Sim. 53; *King of Hanover v. Wheatley*, 4 Beav. 78.

³ *Lewis v. Owen*, 1 Dick. 6; Beames's Ord. 96, S. C.; Hind. 333.

⁴ Hind. 333.

⁵ Ord. 26, 1833.

⁶ *Turner v. Burleigh*, 17 Ves. 354.

SECTION II.

Of the Examination of Witnesses by the Examiner on Interrogatories.¹

WITNESSES in Chancery are examined either by an Examiner or by Commissioners specially appointed for that purpose by commission under the Great Seal.²

The first thing to be done by the party intending to examine witnesses before the Examiner, is to file his interrogatories, or such of them as apply to the witnesses to be examined, in the manner before pointed out.³ He must then procure the attendance of his witnesses at the Examiner's Office; for which purpose he ought to fix a day with the Examiner, when he will be able to examine them, and to give notice of such day to the witnesses.⁴

If the witness be in prison, his situation must be represented to the Examiner, who will fix a day for attending at the prison to swear and examine the witness. The Examiner (with whom the interrogatories for the examination of such witness should have been previously left) will then proceed to the prison, taking the interrogatories with him, and, the witness being sworn thereto in the common form, the examination is taken in the usual manner, and the depositions and interrogatories are returned by the Examiner to the office, to be kept, as in ordinary cases, until publication pass in the cause.⁵

¹ By rule of Chancery in New Jersey, when any cause shall be at issue, &c., it shall be the duty of the parties to proceed and examine their witnesses within a reasonable time thereafter; and on a notice for the examination of witnesses given by either party, both parties may produce and examine their witnesses; but the examiner, if required so to do, shall first examine the witnesses of the party who first gave notice. Rule XIII. § 1.

² In the United States Courts the Commissioner or Commissioners shall be named by the Court or a Judge thereof in all cases. Equity Rule 67.

³ *Supra*, p. 858.

⁴ Notice that witnesses will be examined at a particular tavern in a city named in the notice, without naming the christian name of the tavern-keeper, is good, unless it is shown that there were in the same city two tavern keepers of the same surname. *Overstreet v. Thompson*, 1 Litt. 120. An irregularity in the service of notice of examination will be considered as waived by a neglect to complain of it in due season. *Skinner v. Dayton*, 5 John. Ch. 191.

⁵ Before the stat. 3 & 4 Will. IV. c. 94, it was necessary that the Master should go to the prison, as well as the Examiner, for the purpose of administering the oath. IIind. 330.

In like manner, if a witness be incapable, by reason of sickness, of attending at the Examiner's Office to be examined, and it is not thought necessary to sue out a commission to take his examination, the Examiner may go to the place of the witness's residence and administer the oath and take the deposition of the witness.¹ In either of the above cases notice must be given in the usual manner to the other party of the time and place of examination.

The form of the oath administered to witnesses in Chancery is as follows : —

" You shall true answer make to all such questions as shall be asked of you on these interrogatories, without favor or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth : So help you God."

After the witness has been sworn to the interrogatories, a *jurat*, stating the producing and swearing of the witness to the interrogatories, with his name and the day and year when sworn, is inscribed upon the interrogatories, and signed by the Examiner.² If, after the witness has been sworn, any alteration is made in the title, or any part of the interrogatories, they must be re-sworn, but not re-produced.³

When new interrogatories are added, the witness must be sworn to them in the same form.

Before the witnesses are examined, the Examiner ought to be, and generally is, furnished with instructions as to which of the interrogatories each witness is to be examined upon. The solicitor also supplies a minute of the evidence he expects his witness to give ; but of such minute no use can be made in the examination.⁴

After the examination is begun, the Examiner ought not to confer with either party touching the examination, or take new instructions respecting the same.⁵

With respect to the method of examining a witness,⁶ Lord Clar-

¹ An order for this purpose seems to be necessary. See anon. 4 Mad. 463. *Sed quære*, if the Examiner is willing to go without an order ?

² Hind. 322.

³ See Mr. Plumer's return of the duties of Examiners to the Chancery Commission, Chan. Rep. Appx. B. No. 22, p. 542.

⁴ Mr. Plumer's statement, *ubi supra*.

⁵ Hind. 325 ; 4 Inst. 278.

⁶ In the United States Courts, these examinations may now be conducted orally, and the testimony taken down in writing by the Examiner, the examina-

endon's Orders, which have been before referred to, direct, that "the Examiner is to examine the deponent to the interrogatories directed *seriatim*, and not to permit him to read over, or hear read, any other interrogatories, until that in hand be fully finished; much less is he to suffer the deponent to have the interrogatories, and pen his own depositions, or depart, after he hath heard an interrogatory read over, until he hath perfected his examination thereto. And if any witness shall refuse so to conform himself, the Examiner is thereof to give notice to the clerk of the other side, and to proceed no further in his examination without the consent of the said clerk or order made in Court to warrant his so doing."¹ The same Orders afterwards direct, that "the Examiners, in whom the Court repositeth great confidence, are themselves in person to be diligent in the examination of witnesses, and not to intrust the same to mean and inferior clerks, and are to take care and hold the witness to the point interrogated, and not to run into extravagances and not pertinent to the question."² "Moreover, they are not to use any idle repetitions or needless circumstances, nor to set down any answer to a question to which the examinant cannot depose other than thus, '*to such an interrogatory this examinant cannot depose*'; and in case such impertinencies be observed by the Court, the Examiner is to recompense the charge thereof to the party grieved, as the Court shall direct."³

The Examiner is not strictly bound to the letter of the interrogatories, but ought to explain every matter or thing which ariseth necessarily thereupon;⁴ and forasmuch as the witness, by his oath, which is so sacred, calleth Almighty God (who is truth itself, and cannot be deceived, and hath knowledge of the secrets of the heart) to witness that which he shall depose, it is the duty of the Examiner gravely, temperately, and leisurely to take the depositions of witnesses, without any menace, disturbance, or interruption of them in hinderance of the truth.⁵

tion and cross-examination to be conducted in the mode pursued in common law courts. Ante, 889, 890; U. States Court Equity Rule, 67, and the amendment thereof, March 17, 1862, 24 Law Rep. 380, 381. In Massachusetts, see *Pingree v. Coffin*, 12 Cushing, 600.

¹ Beames's Ord. 187. See *Hickok v. Farmers' and Mechanics' Bank*, 35 Vermont, 476.

² Ibid. 188.

³ Ibid. 190.

⁴ Hind. 325; 4 Inst. 278. See also *Peacock's Case*, 9 Rep. 70.

⁵ Hind. 325; 4 Inst. 278.

The Examiner, having read an interrogatory to the witness, takes down the answer in writing upon paper, concluding the answer to each interrogatory before the following one is put.

A witness may be permitted to use such short notes as he brings with him to refresh his memory, but not the substance of his depositions; nor may he transcribe such notes *verbatim*.¹ The rule at law is, in this respect, the same; and in an anonymous case in Mr. Ambler's reports,² Lord Hardwicke said, "that, at Law, a witness is allowed to refresh his memory by notes as to dates and names, because there is nothing to guide the memory as to them; but he never knew a Court of Law admit the whole evidence to be given from writing. There is no certain rule how far evidence may be given from notes; some Judges had thought, and he was (he said) inclined the same way, that the witness might speak from notes which were taken at the time of the transaction in question, but not if they were written afterwards."³

In that case, a motion was made to suppress a deposition taken before Commissioners, because the attorney for the plaintiff had written down the whole in the exact form of the deposition before it was taken; and though it appeared that the witness had told him the facts and circumstances mentioned in it, yet his Lordship said it would be of dangerous tendency to permit it to be read; for in depositions, it is natural to state the evidence as given by the witnesses, but that, in the case in question, the attorney had methodized and worded it; and that it was, therefore, no more than an affidavit.⁴

In order to secure the statement of the evidence upon the depositions in the very words of the witness, the stat. 3 & 4 Will. IV. c. 94, s. 27, has enacted, that all depositions of witnesses examined in the High Court of Chancery are to be taken in the first person; formerly the practice was to take them in the third person.⁵

¹ Curs. Canc. 260.

² Anon. Amb. 252.

³ See Phil. & Amos, 891. See *Hickok v. Farmers' and Mechanics' Bank*, 35 Vermont, 476.

⁴ *Ibid.* See also *Shaw v. Lindsey*, 15 Ves. 380; *Ferry v. Fisher*, cited *ib.* 382; Phil. & Amos, 896; *St. Catherine Dock Co. v. Mantzgu*, 1 Col. 94. See *Hickok v. Farmers' and Mechanics' Bank*, 35 Vermont, 476.

⁵ By Chancery Rule XIII. § 11, in New Jersey, the Examiner shall number each page of the examination taken by him, and also every tenth line of the same, leaving sufficient margin for the purpose; and where more than one witness is examined, he shall annex a separate leaf to the examination, containing a list of

If a witness to be examined does not understand English, an order should be obtained to appoint an interpreter to interpret the interrogatories and depositions.¹ The person so appointed must be sworn to interpret truly, and the depositions of the witnesses are to be taken down by the Examiner, from the interpretation, in English.² It was Lord Nottingham who established the rule that "no alien should be examined as a witness without a motion first made in Court to swear an interpreter, that the other side might know him, and take exceptions to the interpreter."³

When all the interrogatories, upon which the Examiner has been instructed to examine the witness, have been gone through, the Examiner carefully reads over the whole deposition to the witness, who, if he be satisfied with it, signs each sheet of it in the presence of the Examiner.

If the witness wishes to vary his testimony, or to make any alteration in or addition to it, he must do so before signing the deposition ; for, by an order of the Court, when witnesses are examined in Court, they are to perfect and subscribe their deposition to such interrogatories as they have answered, before they depart from the Examiner or his deputy ; and they are not to be permitted to make any alteration thereof at any time thereafter without leave of the Court, unless it be in some circumstance of time or the like, or for making perfect of a sum upon view of any deed, book, or writing, which the witness shall show to the Examiner before he permits such alteration.⁴

the names of the witnesses, and a reference to the pages on which their examination respectively commences ; and no costs are to be taxed for any examination where this rule is not strictly complied with.

¹ See *Gilpins v. Consequa*, 1 Peters C. C. 85 ; *Amory v. Fellows*, 5 Mass. 219.

² *Smith v. Kirkpatrick*, 1 Dick. 103 ; see also *Lord Belmore v. Anderson*, 2 Cox, 288, and 4 Bro. C. C. 90, S. C.

³ 2 Swanst. 261, n.

⁴ Beames's Ord. 74. A witness may explain or correct a mistake made by him, at any time before his examination is finally closed ; but no part of his testimony, previously reduced to writing, can be erased or altered. 1 Hoff. Ch. Pr. 463. Under the former practice in Chancery in New York, amendments of testimony were allowed in open Court, after publication and at the hearing, on an allegation of mistake in taking down the testimony. *Denton v. Jackson*, 1 John. Ch. 526. So a re-examination has been allowed on the affidavit of the witness that his testimony in material parts was not truly taken down. *Trustees of Kingston v. Tappen*, 1 John. Ch. 368. The existence of the mistake ought to be made out to the perfect satisfaction of the Chancellor. *Gray v. Murray*, 4 John.

It is to be noticed, that the signature of a witness to his examination is absolutely necessary, and that if a witness should die after his examination is completed, but before it is signed, the deposition cannot be made use of.¹ It seems, however, that if a witness, having signed his examination in chief, dies before he is cross-examined, his depositions may be read as evidence; the Court, however, bearing in mind the fact that the cross-examination has not taken effect, especially if it should appear that the party had lost any material fact which was within the knowledge of the witness, and could not have been proved by other means.²

If a witness refuses to be cross-examined, his deposition cannot be read.³

By the 26th of the Orders of 1828,⁴ the Examiner who takes the examination in chief is at liberty to take his cross-examination also; before that time, the cross-examination of a witness was taken before a different Examiner from the one who examined him in chief;⁵ a practice which appears to have been sanctioned by the stat. 50 Geo. III. c. 8, by which it was directed, that the witnesses on different sides of the same cause, should (if the same was practicable) be examined by different Examiners.⁶

Ch. 413. See *Hallock v. Smith*, 4 John. Ch. 649; *Newman v. Kendall*, 2 A. K. Marsh. 236. A witness examined while incompetent, by reason of interest, may be re-examined after his competency is restored. *Haddix v. Haddix*, 5 Litt. 202. See *Dunham v. Winans*, 2 Paige, 24.

¹ *Copeland v. Stanton*, 1 P. Wms. 414. The signature of the witness seems not to be held necessary to a deposition in many of the States. See *Moulson v. Hargrave*, 1 Serg. & R. 201; *Mobley v. Hamit*, 1 A. K. Marsh. 590; *Rutherford v. Nelson*, 1 Hayw. 105; *Barnett v. Watson*, 1 Wash. 372; *Wiggins v. Pryer*, 3 Porter, 430.

² *O'Callaghan v. Murphy*, 2 Sch. & Lef. 158. A witness became interested by a death while under examination. The death occurred during his cross, but before further direct, examination. The Court allowed the deposition to stand so as to embrace the direct and cross-examination, but struck out the further direct. *Fream v. Dickinson*, 3 Edw. Ch. 300.

³ *Prac. Reg.* The testimony of the witness is complete, so far as the party calling him is concerned, when the direct examination is finished and signed by the witness; but the party calling him is bound to keep the witness before the Examiner a sufficient length of time afterwards, to enable the adverse party to complete the examination, or the deposition may be suppressed. *Trustees of Watertown v. Cowen*, 5 Paige, 510.

⁴ Ord. 1828.

⁵ See *Troup v. Haight*, 6 John. Ch. 335

⁶ *Turner v. Burleigh*, 17 Ves. 354.

We have seen before, that, previously to the examination of a witness, a notice in writing of the name and description of the witness is to be served upon the adverse solicitor. The object of this notice is, that in case the adverse party shall have occasion to cross-examine the witness, he may have an opportunity of doing so. The cross-interrogatories ought to be filed before the examination in chief is completed; and if they are so filed, the party producing the witness is obliged to procure him to stay or return to be examined.¹

Where the interrogatories for cross-examining a witness are not filed, or the witness is not required to be cross-examined whilst he is under original examination, but is allowed to depart about his business, the party who intends to cross-examine that witness must procure his examination in the best manner he can: the adverse party is not bound to produce him again; but as it is usual after the witness is sworn, if he be resident in London, for the Examiner to appoint some other day for him to attend to be examined,² the party intending to cross-examine has generally sufficient opportunity to prepare and file his interrogatories. In the mean time, however, to prevent the examination being taken without the cross-examination, a note in writing may be stuck up in the Examiner's Office, that if *such a person* come to be examined in *such a cause*, let him be cross-examined.³

In the case of *Keymer v. Pering*,⁴ it is stated that "the practice of the Examiner's Office is, that where a party produces a witness to be examined by one of the Examiners, the opposite party having notice, and intending to cross-examine the witness, makes an appointment with the other Examiner for that purpose, and then gives notice of the time appointed to the witness, and also to the solicitor of the party producing the witness." It appears from the case, that if the party intending to cross-examine neglects to make the appointment, he loses the right to cross-examine.

If a witness refuses to attend to be cross-examined, an application may be made to the Court, (it is presumed in the same manner already pointed out in the case of a witness refusing to be examined in chief,⁵) which will compel the witness to do what the party has a right to require of him.⁶

¹ Hind. 323.

² Ib. 323. The depositions, however, always bear date the day of the swearing.

³ Ibid.

⁴ 10 Sim. 181.

⁵ Ante, p. 916.

⁶ *Courtenay v. Hoskins*, 2 Russ. 253.

Some doubt appears to exist whether a subpœna will lie to compel a witness to attend for the purpose of being cross-examined.

If a party examining a witness does not allow a sufficient time for cross-examination before the time for passing publication expires, and cross-interrogatories are left, such party must either enlarge publication or the deposition will be suppressed.¹

A witness who is cross-examined must be sworn to the cross-interrogatories as well as to the original interrogatories.

Under the practice, before the Orders of May, 1845, came into operation, where the Examiner was served with a copy of a rule to pass publication, he could not, after the day fixed by such rule for passing publication, examine any more witnesses, even though the witnesses had been already sworn,² unless he was served with an order to enlarge publication; in which case either party might examine his witnesses as long as the publication continued enlarged.³ Where, however, a witness was examined, by mistake, two days after publication had passed, and was cross-examined by the defendant, the Court would not suppress the deposition.⁴ Now, as we have seen, publication passes without rule at the expiration of two months after the filing of the replication, unless such time expires in the long vacation, or is enlarged by order. It is presumed, that, under the present practice, any examination of witnesses after the time for publication has arrived, will be irregular, whether notice be served upon the Examiner or not.⁵

¹ 1 Smith's Ch. Pr. 3d ed. 476; and see *Keymer v. Pering*, 10 Sim. 179; ante, 921, note.

² Beames's Ord. 73, 186.

³ Anon. 1 Vern. 253.

⁴ *Hammond v. —*, 4 Dick. 50.

⁵ In the case of *Green v. Wheeler*, decided New York Chancery, Aug. 16, 1842, Mr. Chancellor Walworth held, that where an examination of witnesses is commenced before the time for taking testimony expires, it may be continued by the Examiner, if necessary, after the expiration of such time; and until an order to close the proofs is actually entered.

SECTION III.

*Examination of Witnesses — by Commission.*¹

A COMMISSION to examine witnesses in England cannot be obtained before the cause is at issue: unless it be in one of those cases in which the Court authorizes such a commission to examine witnesses *de bene esse*, which will be noticed in the next section. In cases, also, where the bill has been exhibited for the purpose of perpetuating testimony, and the defendant is in contempt to an attachment for want of an answer, the Court has allowed the plaintiff to have a commission to examine his witnesses.²

With respect to the time within which a commission may be obtained, the practice is now regulated by the Orders of May, 1845, the 95th of which directs, that "Immediately after the replication is filed, the plaintiff, if he thinks fit, may give notice to all other parties entitled to examine witnesses in the cause, of his intention to sue out a commission for that purpose, and the plaintiff, if he gives such notice within two days after the filing of the replication, or before any defendant has given notice of his intention to sue out a commission, is to have the carriage of the commission."³

¹ In reference to the taking of depositions either at home or abroad, many cases will be found collected in note (42) to 2 Phil. Ev. (Cowen & Hill's notes,) pp. 32 to 41. See also 1 Greenl. Ev. § 320 to 325. To entitle depositions to be read in evidence, the rules of Court and statutes respecting them must be strictly complied with. *Wallace v. Mease*, 4 Yeates, 520; *Bell v. Morrison*, 1 Peters, S. C. 351; *Winooski Turnp. Co. v. Ridley*, 8 Vermont, 404; *Bradstreet v. Baldwin*, 11 Mass. 229; *The Argo*, 2 Wheat. 287; *Evans v. Eaton*, 7 Wheat. 356; *Sanders v. Howe*, 1 Chip. 363; *Collins v. Elliot*, 1 Har. & John. 1; *Den v. Farley*, 1 South. 124; *Hendricks v. Craig*, 2 ib. 567; *Worsham v. Gove*, 4 Porter, 441; *Wiggins v. Pryor*, 3 Porter, 430; *Shepherd v. Thompson*, 4 New Hamp. 213; *Welles v. Fish*, 3 Pick. 74; *Burroughs v. Booth*, 1 Chip. 106.

² *Lancaster v. Lancaster*, 6 Sim. 439; see also *Coveny v. Athill*, 1 Dick. 355.

³ By 67th Equity Rule of the Supreme Court of the United States, after a cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same, in the Clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*; and since the amendment of this rule, March 17, 1862, testimony may still be taken on commission, in the

We have before seen, that publication now passes without rule or order at a certain fixed period, generally two months from the filing of the replication; and it does not seem that the mere fact of suing out a commission will by itself in any manner delay the time at which publication would otherwise pass. It certainly is in the power of any party who examines witnesses to apply to the Master for an order to enlarge the time of publication, but the Master in granting or refusing such an application, will probably be guided by the consideration, whether the party applying has used proper diligence in obtaining the commission, and in proceeding under it. So that it is necessary for any plaintiff or defendant who is desirous of examining witnesses by commission, to be careful to obtain the writ sufficiently soon after replication, otherwise he will run the risk of the time for publication arriving before he has completed his examination.

We have next to consider the persons to whom commissions may be directed, and the manner in which they are selected.¹ With respect to this subject, the 94th Order of May, 1845, directs that "Commissions to examine witnesses within the jurisdiction of the Court are to be directed to two Commissioners only, and unless the Court otherwise orders, are to be made returnable without delay; and the Commissioners are to be either barristers or solicitors not concerned in the cause; and each one of such two Commissioners is to have all such power and authority to examine witnesses as have heretofore been vested in the acting Commissioners named in the commissions to examine witnesses which have heretofore been issued; but the Commissioner first named in the commissions to be hereafter issued is alone to act in the execution of any commission, unless he is by illness or other sufficient cause incapacitated from acting therein; in which case the Commissioner secondly named is alone to act in the execution of such commission."

usual way, by written interrogatories and cross-interrogatories, on motion to the Court in term time, or to a Judge in vacation, for special reasons satisfactory to the Court or Judge.

¹ By the 67th Equity Rule of the Courts of the United States, the Commissioner or Commissioners to take depositions, shall in all cases be named by the Court, or by a Judge thereof. But this rule has been so amended as to allow the presiding Judge of any Court exercising jurisdiction, either in term time or in vacation, to vest in the Clerk of said Court, general power to name Commissioners to take testimony in like manner that the Court or Judge thereof could do by the said 67th Rule.

The 99th Order directs, that "If any question arises as to the Commissioner who is to be first named, or as to the party who is to have the carriage of the commission, the Master is to determine such question, and to name the party who is to have the carriage of the commission."

A commission to examine witnesses has not hitherto been obtained without an order, which, however, may be procured either by motion of course, or by petition at the Rolls.

The Orders of 1845 do not seem to dispense with the necessity of an order being obtained for a commission, although they do not in terms allude to the necessity of one hereafter being obtained. The form of the order has been, "*that the plaintiff, [or, if the order be obtained by the defendant, the defendant,] may have a commission for the examination of his witnesses in the cause. And that the defendant's [or plaintiff's] solicitor do, in four days after notice thereof, join and strike Commissioners' names with the plaintiff's [or defendant's] solicitor, in default thereof, that the plaintiff [or defendant] may have such commission directed to his own Commissioners.*"

As the practice of joining in commission, and striking Commissioners' names, is abolished by the Orders of 1845, the order for a commission, if any be hereafter necessary, must be different in form to that above stated.

Under the Orders of 1845, unless all the parties entitled to examine witnesses agree in the Commissioners to be appointed, and the order in which they are to be named, the whole question is to be settled by the Master. It will not, therefore, be necessary to state in detail the previous practice in striking Commissioners' names and joining in commission, further than that it was the rule for the party suing out the commission to give an opportunity to the opposite party to join therein. In such a case the plaintiff and the defendant, or each set of defendants joining in the commission, used to name four Commissioners, — the whole number was then reduced by each party alternately striking out names until there remained two Commissioners for the plaintiff and two for the defendant, or for each set of defendants.¹

We have seen that now, under the 94th Order, the Commissioners must be either barristers or solicitors not concerned in the cause, but no further restriction is put upon the character of the persons to be appointed. Before this Order it was a rule that the

¹ Hind. 298, 303; 1 Harr. ed. New. 244.

Commissioners should have been indifferent persons. A solicitor in the cause could not be a Commissioner;¹ and the policy which excluded solicitor extended also to solicitor's clerks.² Solicitors' clerks are not mentioned in the 94th Order, probably because now no person is eligible unless either a barrister or solicitor.

The common exceptions to commissioners are stated to be these, viz. "that he is of kindred allied to the party for whom he is named;³ that he is master to the party, his landlord, or partner; that he hath a suit in Law with the party adverse to him for whom the Commissioner is named; or is of counsel; or is attorney, or solicitor, or follower of the cause on one side;⁴ that the party is indebted to him; or any other apparent cause of partiality or siding with either party."⁵

It is said, in a book of authority, that "after Commissioners are struck, if it be discovered that one or more of the Commissioners is or are nearly allied, *of counsel*, solicitor, master, or partner with the plaintiff or defendant, or any apparent cause of partiality or siding with either party can be shown, the Court, upon motion, or the Master of the Rolls, upon petition, will order the opposite party to name Commissioners *de novo*, in the place of one or more of them so complained against, or that the commission issue *ex parte*; because, though the Commissioners are named by the party, yet that is but by way of proposal to the Court, for they are the ministers of the Court, and therefore must be impartial."⁶

It may also be remarked, that the policy which excludes partial persons from being Commissioner extends also to exclude them from taking any part in a commission; therefore, where the clerk of a solicitor in the cause has been employed as clerk to the Commissioners, the depositions under the commission have been suppressed.⁷

¹ Fricker v. Moore, Bunb. 289; Selwyn's Case, 2 Dick, 563.

² Cooke v. Wilson, 4 Mad. 380.

³ See Heacock v. Stoddard, 1 Tyler, 344, and Chandler v. Brainard, 14 Pick. 285, cited in note (3). A deposition taken before an uncle of a party to a suit was held inadmissible in New Hampshire. Bean v. Quimby, 5 N. Hamp. 94.

⁴ See Smith v. Smith, 2 Greenl. 408; Coffin v. Jones, 13 Pick. 441; Wood v. Cole, 13 Pick. 279.

⁵ Prac. Reg. 121; Lord Mostyn v. Spencer, 6 Beav. 135. Under the provision, that no person interested shall draw up a deposition to be used in a cause, &c., a son-in-law of a party was held not disqualified in Heacock v. Stoddard, 1 Tyler, 344. See also Chandler v. Brainard, 14 Pick. 285.

⁶ Hind. 305.

⁷ Newton v. Foot, 2 Dick. 793; Newte v. Foot, 2 Ch. R. 393, S. C. *semble*; Cook v. Wilson, 4 Mad. 380; and see Sayer v. Wagstaff, 5 Beav. 462.

It is said that if a Commissioner refuses to act, the suitor has no remedy by action against him ;¹ it is therefore important, before any person is named as a Commissioner, that the person naming him should ascertain whether he is willing to act.

A Commissioner refusing to act might, in all probability, be proceeded against for a contempt of the Court, if without excuse, but doubtless they will not punish a person for it unless his reasonable expenses be allowed.²

As under the present practice one Commissioner is alone to act in the commission, it is obvious that he must be considered in all respects as the officer of the Court whose duty it is to act indifferently to each side ;³ but even before the Orders of 1845, when Commissioners for each side were appointed, it was declared by Lord Eldon, that for Commissioners to consider themselves as acting for one side only, though a very common, is a very gross mistake. They are to act impartially, but, to a certain extent, on both sides ; they have under their particular care the interest of the party appointing them.⁴

The 103d Order of May, 1845, has directed, that "The form of a commission to be hereafter issued for the examination of witnesses is to be as follows, with such (if any) variations as the circumstances of the case require.

" VICTORIA, &c.

" To A. B. and C. D. greeting.

" Know ye, that we in confidence of your prudence and fidelity have appointed you, and by these presents do give unto each of you full power and authority diligently to examine all witnesses whatsoever upon certain interrogatories to be exhibited to you in a cause wherein E. F. is complainant, and G. H. and others are defendants ; and therefore we command that one of you do at certain days and places to be appointed for that purpose, cause the said witnesses to come before you, and then and there examine each of them apart upon the said interrogatories, either on their respective corporal oaths first taken before you upon the Holy Evangelists, or, in the case of Quakers, upon their solemn affirmation and declaration, or in such other solemn manner as is or may be authorized by law, and that you do take such their exam-

¹ Hind. 360.

² Ibid.

³ See also *Blundell v. Gladstone*, 9 Sim. 455.

⁴ *Campbell v. Scougall*, 19 Ves. 553.

inations, and reduce them into writing on parchment, and when you shall have so taken them, you are to send the same to us in our Chancery without delay wheresoever; it shall then be closed up, and under your seal distinctly and plainly set together, with the said interrogatories and this writ. And we further command you, that before you act in or be present at the swearing or examining any witness or witnesses, you do take the oath first specified in the schedule hereunto annexed.¹ And we further command that all and every the clerk or clerks² employed in taking, writing, transcribing, or engrossing the deposition or depositions of witnesses to be examined by virtue of these presents shall, before he or they be permitted to act as clerk or clerks as aforesaid, or be present at such examination, severally take the oath last specified in the said schedule annexed, and we also give to you full power and authority to administer such oath to such clerk or clerks in manner aforesaid. Witness ourself at Westminster, the
 day of in the year of our reign.

LANGDALE."

(Indorsement.)

"By order of Court."

(Name and Address of Agent and Solicitor issuing Writ.)

It appears from this form, that commissions are in all cases hereafter to be made returnable without delay, the effect of which is, that if the commission be made out in term time, it holds to the first return of the ensuing term: and if made out in the vacation to the last return of the subsequent term.³

By the 106th Order, "The Commissioner having taken the oath, is at the instance of any party entitled to examine witnesses, to sign and deliver to such party a notice in writing, specifying the time and place when and where he will proceed to examine witnesses, and such notice is to be duly served by the party who ob-

¹ The rules of Chancery in New Jersey provide, that every person who shall be appointed an examiner of the Court of Chancery shall, before he enters upon the execution of his office, take, before the Chancellor or Clerk, an oath or affirmation impartially and justly to perform all the duties of the office, according to the best of his abilities and understanding. Rule III. § 1. See *State v. Levy*, 3 Har. & McHen. 591.

² It is not necessary in the United States that there should be a clerk to the commission. *Beard v. Heide*, 2 Harr. & John. 442.

³ Hind. 302.

tains it upon the solicitors of all the other parties entitled to examine witnesses under the commission, and in case any such party has no solicitor, upon such party at least ten clear days before the day therein named for proceeding to examine witnesses.”

It appears from these Orders, that hereafter every commission will be for the benefit of all parties entitled to examine witnesses in the cause; and that the Commissioner will have full power both to examine and cross-examine witnesses on behalf of all parties. Moreover, the power of carrying the commission into execution, will not hereafter be confined to the party who has the carriage of the commission, but any party may obtain a notice from the Commissioners of the time and place where he will examine witnesses; and after service of such notice upon the other parties, such party may proceed to examine his own witnesses at the time and place appointed.

The time and place of opening a commission having been appointed, the next thing to be done is to secure the attendance of the witnesses. This may be effected by summons from the Commissioners, unless it is supposed that the witness will not attend voluntarily, in which case a *subpœna ad testificandum* must be resorted to.¹

The summons must be entitled in the cause, and has hitherto been in the following form:—

“Whereas we have received a commission issuing out of and under the seal of the High Court of Chancery, to us and to others therein named directed, for the examination of witnesses in a cause in the said Court depending between John Doe and others, plaintiffs, and Richard Roe and others, defendants; and whereas we are informed that you whose names are hereunder written are material witnesses for [the plaintiffs or the defendants]; we therefore, by virtue of the commission, will and require you and every of you, severally and personally, to be and appear before us, the said Commissioners, or any two or more of us, at the house of _____, known by the name or sign of _____, situate in _____, in the _____ of _____, on _____, the _____ day of _____ instant, at the hour of _____ in the _____ noon, to testify the truth, according to the best of your knowledge, for and on behalf of the said [plaintiffs or defendants]; and you are then and there to attend, and not to depart

¹ See 78th Equity Rule of the United States Courts.

*until you have been examined on the part of the [plaintiffs or defendants]; and herein you are not to fail. Dated," &c.*¹

If the production of a document is required, a notice to produce it must be added to the summonses in the same form as the *duces tecum* clause in a subpoena.

These summonses have hitherto been signed by two or more of the Commissioners, but it is presumed that hereafter the signature of the acting Commissioner will be sufficient.

They must be directed to the witnesses by name, and served upon each witness by showing him the original summons, and leaving a copy with him a reasonable time before the execution of the commission, with one shilling conduct money.² But if a witness resides at any great distance from the place where the commission is to be executed, his reasonable expenses must be paid or tendered to him, otherwise he is not bound to appear; nor, if he appears, is he bound to give evidence until his reasonable expenses are actually paid or tendered to him.³

No process of contempt lies upon a disobedience of this summons, no writ under seal being directed to the witness; and therefore it is that a summons should be served upon those witnesses only whose attendance can be depended upon.⁴

A *subpœna ad testificandum* before Commissioners is in the same form as a *subpœna ad testificandum* before the Examiner,⁵ save that instead of commanding the attendance of the witness before the Examiner it commands his attendance "*before A. B. and others, Commissioners, appointed for the examination of witnesses in our Chancery, at such time and place as the bearer hereof shall, by notice in writing, appoint.*"⁶

The regulations as to suing out the writ, and for serving it, and the notice accompanying it, are the same as those already pointed out with reference to a *subpœna ad testificandum* before the Ex-

¹ Hind. 336.

² Ibid.

³ Ibid. 337.

⁴ Ibid. It is suggested, in the same work, that the Court, in aid of the Commissioner's summons, might, upon disobedience to it, so far interpose as to make an order for the witness to attend at the examination for the purpose of being examined, &c.; but this seems to be doubtful; and the safest way, when there is any doubt of the witness's attendance, is to serve him with a subpoena.

⁵ Ante, p. 900, 901.

⁶ Ord. May, 1845, Appx.

aminer.¹ It must also be accompanied by a similar notice of the time and place of attendance.

If the witness, having been duly served with the *subpœna* and notice, neglects or refuses to appear, or having appeared, refuses to give evidence or sign his deposition, &c., an order may be obtained for the witness's attendance, at his own expense, to be sworn and examined *before the Commissioner* within four days, or that he may stand committed, &c., in the same manner that such an order is obtained upon a witness making default in his attendance before the Examiner; ² and the same compulsory line of process may then be gone through to enforce obedience to the order.³

If a witness, served with a *subpœna duces tecum*, refuses to produce the document mentioned in the *subpœna*, upon being required to do so by the Commissioners,⁴ an application may be made to the Court by motion, when, if the witness shows no sufficient ground for withholding the production, an order will be made that he attend again before the Commissioners, and produce it, and pay the plaintiff the costs occasioned by his previous refusal.⁵

The Commissioner and witnesses having met at the time and place appointed by the notice for the execution of the commission, the commission, which till that time must remain sealed, may be opened and read by the Commissioner to see his authority.⁶ Although two Commissioners are hereafter to be appointed in every case, yet it seems that as the second is only to act when the first is incapacitated, there will be no necessity for both to attend upon the opening of the commission.

¹ Ante, p. 901.

² Ante, p. 902; Hind. 339, 340.

³ Ante, p. 903; Hind. 339, 340. Commissioners may summon a witness to attend before them; and the Court will compel the witness to do so; but a commission should be issued so as to have the examination at a reasonable distance from the residence of the witness. *Maccubbin v. Matthews*, 2 Bland, 250. See 78th Equity Rule of the United States Courts, by which it is provided that witnesses may be summoned to appear before the commission by *subpœna* in the usual form, which may be issued in blank by the Clerk, and filled up by the party praying the same, or by the Commissioner. See Rule XIII. § 5, of the New Jersey Chancery Rules.

⁴ *Bradshaw v. Bradshaw*, 1 Russ. & M. 358. Commissioners are entitled to demand the production of the document by the witness, although there is no interrogatory as to the fact of his having it in his possession.

⁵ *Bradshaw v. Bradshaw*, *ubi supra*.

⁶ Hind. 342.

The 107th Order of May, 1845, directs that "All depositions of witnesses are to be taken and expressed in the first person of the deponent."

By the 108th, "If the examination of witnesses cannot be completed in one day, and the circumstances of the case permit, the Commissioner is to proceed *de die in diem* during six hours of each day between the hours of eight in the morning and six in the afternoon, until the witnesses for all parties are fully examined; nevertheless, the Commissioner may, if in his opinion the circumstances of the case require an adjournment, adjourn the proceedings from time to time, and from place to place, in such manner as he thinks proper, but he is in all cases to enter on the depositions any adjournment, and where such adjournment is from place to place or otherwise than *de die in diem*, the cause or reason of such adjournment, and he is also to enter on the depositions the hours of the day on which he commences and concludes the examination of witnesses on each day, and the true cause of his not proceeding for the full time of six hours on each day, if such should be the case."¹

By the 109th Order, "When the examination of witnesses is completed, the Commissioner is to seal up the depositions, and is to transmit the same sealed up with the commission to the Record and Writ Clerk's Office."

Under these Orders the Commissioner is empowered to adjourn the proceedings; a similar power has always existed in the Commissioners, if they agreed in the necessity of making an adjournment.²

The fair course of proceeding, however, is not to adjourn without necessity; the examination should be completed as far as it can be done *uno actu*, that there may be as little opportunity as possible to divulge the depositions;³ and it seems that formerly if the plaintiff or his Commissioners abused the carriage of the commission by making unnecessary adjournments, or an irregular examination of witnesses, such a proceeding entitled a defendant to have a commission of his own and the carriage of it.⁴

As soon as the commission has been opened and read, both parties must, if they intend to examine witnesses, exhibit their inter-

¹ See *Hunter v. Fletcher*, 5 Rand. 126; *Edgell v. Lowell*, 4 Vermont, 412.

² *Brown v. Vermuden*, 1 Cha. Ca. 282; Hind. 352.

³ Hind. 353.

⁴ Ibid.

rogatories, as well those intended for cross-examination as those for examination in chief. For the reason which has been before stated, these interrogatories should be produced to the Commissioner before he is sworn ; after the Commissioner has been sworn, it seems doubtful whether new interrogatories can be exhibited without an order of the Court.¹

Formerly, upon the opening of the commission, the Commissioners used to administer the oath to one another, and also to the clerk.² But now the acting Commissioner takes the oath before any Master in ordinary, or any Master extraordinary in Chancery, but the clerk is still sworn by the acting Commissioner. It has formerly been permitted for a Commissioner to be examined as a witness under the commission, but the other Commissioners had no power to enforce his attendance for that purpose.³ If a Commissioner was so examined, his examination was taken by the other Commissioners before he was sworn as Commissioner, or any other witness had been examined in his presence, otherwise his examination would have been irregular, and his deposition might have been suppressed.⁴

If, from any circumstance, the examination of a Commissioner became necessary, after he had been present at the examination of the other witnesses, application was made to the Court for leave to examine him.⁵

It seems that the same rule now applies to the clerk of the Commissioners ; therefore, if it be necessary to examine him as a witness, he must be examined before he is sworn as clerk,⁶ or at least before any other witness has been examined.

The circumstance of a Commissioner or a clerk having been examined as a witness, did not prevent him from afterwards acting in the commission.

There was a rule formerly, which seems still applicable, that, after the examination is begun the Commissioners ought not to confer with either party, touching the examination, or to take new instructions concerning the same ; and if they do so, it will be a great misdemeanor, and punishable by fine and imprisonment.⁷

¹ Ante, p. 914.

² Hind. 344.

³ 2 Roll. Rep. 90.

⁴ Prac. Reg. 125.

⁵ Grubb v. Grubb, 1 Y. & J. 36.

⁶ 1 Harr. ed. Newl. 274 - 5.

⁷ Hind. 348, cited 4 Inst. 278 ; 9 Rep. 70 ; Cro. Jac. 65 ; Yelv. 62.

The following rules concerning the method of examining witnesses, by commission, are taken from the practice previous to the Orders of 1845, but they seem still applicable to the present practice.

The oaths having been administered, the Commissioner subscribes his name to the foot of each schedule of interrogatories respectively.¹

The title of the depositions, preparatory to the examination of witnesses, is then written upon paper thus: —

*“Depositions of witness, produced, sworn, and examined, on the day of , in the year of Queen Victoria, and in the year of our Lord 18 , at the house of , called or known by the name of the in , in the of , by virtue of a commission issuing out of her Majesty’s High Court of Chancery, to us A. B., and C. D., and others directed, for the examination of witnesses, in a cause there depending between John Doe complainant, and Richard Roe defendant; we the acting Commissioners, under the said commission, and also the respective clerks by us employed in taking, writing, transcribing, and engrossing the said depositions, having first duly taken the oaths annexed to the said commission, according to the tenor and effect thereof, and as thereby directed, on the part and behalf of the complainant John Doe.”*²

The Commissioner calls a witness before him, all other persons being ordered to withdraw during the examination, so that the Commissioner or clerk, and the witnesses to be examined, may be left together in one room; ³ the Commissioner producing the interrogatories, takes them in his hand, and reads the title of them to the witness to be examined, and then administers the oath to him. The form of the oath is the same as that administered by the Examiner; ⁴ but it may be varied as the case may require, and the substance turned into an affirmation for a witness who is a Quaker,⁵ or otherwise entitled to give evidence upon affirmation, instead of oath.⁶

¹ Hind. 345.

² Hind. 345.

³ Shaw v. Lindsey, 15 Ves. 280.

⁴ Ante, p. 904.

⁵ Hind. 346.

⁶ 7 & 8 Will. III. c. 34; 3 & 4 Will. IV. c. 49; 1 & 2 Vict. c. 77. A deposition, to which the witness is not sworn till his testimony is reduced to writing, is irregular. *Armstrong v. Burrows*, 6 Watts, 266.

A witness must first be examined upon the interrogatories of the party who produces him, and then, forthwith without suffering him to go abroad, upon the cross-interrogatories, on the other side.¹—These interrogatories, like the interrogatories in chief, ought, in strictness, to have been delivered before the Commissioner was sworn; but, as we have seen, a party who has omitted to deliver cross-interrogatories in proper time, may procure an order for liberty to add interrogatories to those already exhibited by him.²

The course of proceeding, with regard to the examination of a witness who does not understand the English language, is the same as that to be pursued where the witness is to be examined before an Examiner.³

The party suing out the commission has a right to examine the first witness. Previously to the examination of each witness, the solicitor for the party for whom he is to be examined prepares a note containing the name, rank, or occupation, age, and place of abode of the witness, and of the several interrogatories to which he is to be examined. This notice is to be delivered to the Commissioner; at the same time that the witness is sent in to him, a similar note is usually sent to the solicitors for the other parties, that they may have the witness cross-examined if they think proper.⁴

The witness being sworn, his name, description, address, and age, are written under the title of the depositions, thus:—E. F., of _____, in the _____ of _____, Esq., aged _____ years, a wit-

¹ Hind. 346. By the 67th Equity Rule of the United States Courts, if the parties agreed, the testimony might be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories. But since the amendment of this rule, March 17, 1862, either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the Court, or an examiner specially appointed, in the mode now used in common law courts. See ante, 888, and note.

² Ante, p. 914; *Carter v. Draper*, 2 Sim. 52. It is not necessary in Alabama, that previous to the issuing of a commission to take the deposition of a non-resident witness, the interrogatories should be filed in the Clerk's office. The party may examine the witness before the Commissioners. *Wiggins v. Pryor*, 3 Porter, 430.

³ Ante, p. 920. See *Willings v. Consequa*, 1 Peters C. C. 85; *Amory v. Fellows*, 5 Mass. 219.

⁴ 1 Newl. Ch. Pr. 267.

ness produced, sworn and examined on the part and behalf of the complainant John Doe, depose and saith as follows.

The answer given by the witness to each interrogatory is reduced into writing; and we have seen that now, under the 107th Order, all depositions of witnesses are to be taken and expressed in the first person of the deponent.¹

If a witness, upon being produced before the Commissioner, demurs or objects to be examined, the Commissioner may return the objection with the commission, which will be disposed of in the manner pointed out in the following section.

The Commissioner should himself examine the witnesses, and not leave so weighty an affair to his clerk or others.² The same rules and regulations which have been before pointed out as proper to be observed in conducting the examination of witnesses before the Examiner, should be observed by the Commissioner at the execution of a commission to examine witnesses.³ In addition to which, it may be stated, that the Commissioner is bound only to examine witnesses to those interrogatories or parts of interrogatories to which he is called upon to examine them; ⁴ he is not, however, to judge what interrogatories are pertinent and what are not, but to examine upon the interrogatories as he finds them; ⁵ he is at liberty, however, to exercise some discretion as to what is, or is not, legal evidence, but in doing so he must be very careful that, in rejecting anything, he does not incur the danger of rejecting too much.⁶ He must also be careful not to take down from a witness matters reflecting upon the character of any of the parties, unless the interrogatory leads to it. And where a witness, examined under the last general interrogatory, had deposed several things, reflecting upon an individual, which the Commissioner took down, Lord Hardwicke discharged an order, by which the witness was directed to pay the costs because it was the Commis-

¹ Ante, p. 933.

² Prac. Reg. 124; Hind. 348; *Cappeau v. Baker*, 1 Harr. & Gill. 154.

³ See ante, 917, 918 *et seq.*

⁴ *Whitelocke v. Baker*, 13 Ves. 511.

⁵ *Baker v. Cole*, 2 Swanst. 207, n.

⁶ *Whitelocke v. Baker*, 13 Ves. 511. The magistrate, who takes a deposition, is to judge of the mental capacity of the witness. *Hough v. Lawrence*, 5 Vermont, 299.

sioner's fault to take down any deposition that was scandalous and impertinent.¹

The deposition of each witness, after it has been taken down, should be carefully read over to him, or he should be permitted to peruse and consider what he has deposed ; and if, upon such revision, any errors appear, or the witness, upon recollection, objects to the statement or penning of the depositions, the same must be rectified.² A witness, while he is before the Commissioners, may correct his testimony in the same manner as a witness before the Examiner ;³ but after he has left the Commissioners, he cannot come again for that purpose.⁴

The witnesses must severally subscribe their christian and surnames or marks to the paper drafts of their respective depositions, and where a witness dies after he has been examined, but before he has signed his depositions, they cannot, as we have seen, be read.⁵

If the day appointed for the return of the commission should arrive before the examination of all the witnesses has been completed, the commission, &c., must be closed and sealed up : and it seems that the party wanting a renewed commission, should apply to the Master for leave to sue it out.

After the paper drafts of the depositions have all been signed the whole are engrossed or copied upon parchment by the clerks attending, each witness subscribing his name to his own deposi-

¹ Anon. 2 P. Wms. 406.

² Hind. 349 ; Prac. Reg. 125.

³ A witness may, by the practice of the Court of Chancery in New York, explain or correct any mistake made by him, at any time before his examination is finally closed ; but no part of his testimony, previously reduced to writing, can be erased or altered. Rule 84 ; 1 Hoff. Ch. Pr. 363.

⁴ Lord Abergavenny *v.* Powell, 1 Mer. 130.

⁵ Ante, p. 921. In Pennsylvania, a deposition taken under a commission need not be subscribed by the witness. *Moulson v. Hargrave*, 1 Serg. & R. 201. In Kentucky, it is no objection to a deposition that the witness omitted to subscribe his name. *Mobley v. Hamit*, 1 A. K. Marsh. 590. So in North Carolina. *Rutherford v. Nelson*, 1 Hayw. 105 ; *Murphy v. Work*, 1 Hayw. 105. So in Virginia. *Barrett v. Watson*, 1 Wash. 372. So in Alabama. *Wiggins v. Pryor*, 3 Porter, 430. A deposition taken under a commission to take the deposition of John Priestly, may be read in evidence, though signed John G. Priestly. *Brooks v. M'Kean, Cooke*, 162. See *Breyfogle v. Beckley*, 16 Serg. & R. 264.

tions, thus engrossed.¹ It is said, however, that if the original deposition be signed by the witness, it is not essential that the signature to the engrossment should be in his own hand.²

Where a book, deed, paper, or other exhibit is proved, the following indorsement, (without which it cannot be read at the hearing,) containing the title of the cause, &c., is written upon the exhibit produced, the Commissioner before whom it was proved subscribing his name to the indorsement thus:—

In Chancery.

*Between John Doe, . . . Plaintiff,
and*

Richard Styles, Defendant.

16 August, 1838. *At the execution of a commission for the examination of witnesses in this cause, this paper writing was produced, and shown to R. S., a witness sworn and examined, and by him deposed unto at the time of his examination on the complainant's behalf, [if two or more witnesses prove the same exhibit, add, for each witness,] and was also produced and sworn unto, &c., a witness, &c., before me*
A. B.³

When the examination of witnesses is complete, the Orders of 1845 only direct that the Commissioner is to seal up the depositions and transmit the same sealed up with the commission to the Record and Writ Clerks' Office. Formerly it was the custom for the acting Commissioners to subscribe their names to each skin of parchment, if more than one.⁴ The depositions thus engrossed upon parchment and signed, were then, together with the interrogatories, to be annexed to the commission with the schedule of oaths, and a return is then indorsed upon the commission, near the middle, in the following form:—

“The execution of this commission appears in a certain schedule (or in certain schedules, if more than one,) hereto annexed.”

Commissioners making a false return, e. g. by certifying that a witness was examined upon oath, who was never examined, are finable.⁵

¹ Hind. 349.

² 1 Smith's Ch. Pr. 369, note.

³ Ibid. 350.

⁴ Brydges v. Branfill, 12 S. 324.

⁵ Hind. 358; Cro. Eliz. 623. See Glover v. Millings, 2 Stew. & Port. 28. It will be presumed, that Commissioners have done their duty in keeping and forwarding depositions, unless the contrary appear. Ib. Commissioners to take

The commission, together with the oaths, interrogatories, and depositions annexed, was then neatly and carefully folded, so that no part of the engrossment or writing might have been read, and, being so folded, and bound with red tape or string, in such a manner that the label of the commission only might appear to view, and hang out therefrom, the acting Commissioners set their seals in the several meetings or crossings of the tape or string; and, upon some place on the outside of the commission, subscribed their names.¹

After the commission had been thus executed and made up, the paper drafts of the depositions of the respective witnesses for each party were carefully sealed up and delivered to some of the acting Commissioners, for safe custody. These paper drafts were sometimes divided into two parts, and the parts so divided, interchangeably, kept by the Commissioners for the respective parties; but the most usual way was for the plaintiff's and defendant's Commissioners, respectively, to keep the drafts of the adverse party's witnesses, taking care that no person should see them until publication had passed in the cause.²

The commission having been made up in the manner above directed, with the label hanging therefrom, was either delivered by one of the Commissioners personally into the hands of the clerk in Court, who made it out, or of his agent at his seat in the Six Clerk's Office; or it was delivered by one of the acting Commissioners into the custody of a careful person, with instructions to carry and deliver the same personally into the hands of the clerk in Court or his agent.

When the commission was brought by a messenger, the clerk in Court to whom it was delivered, as soon as it arrived, and previously to its being delivered, took the bearer to the sitting Master at the public office, or to any other Master in his absence, before whom the bearer made oath "*that he received the commission from*

depositions should certify, in their return, that they caused the witness to be examined on oath upon the interrogatories annexed, and that they caused the examination to be reduced to writing; otherwise the depositions cannot be read. *Bailis v. Cochran*, 2 John. 417. See *Glover v. Millings*, *ubi supra*; *Pettibone v. Der-ringer*, 4 Wash. C. C. 215. It is sufficient that the Commissioners certify, in their return, that the oath has been duly taken by them. *Wilson v. Mitchell*, 3 Har. & John. 91; *Glover v. Millings*, *ubi supra*; *Bolte v. Van Rooten*, 130.

¹ Hind. 351. See *Nassear v. Arnold*, 13 Serg. & R. 323.

² *Ibid.*

the hands of one or more of the Commissioners therein named, and that it had not been opened or altered since he received it” ; an indorsement was then made upon the commission thus : —

(Indorsement.)

8 Nov. 1837, upon the oath of *T. P.*, before *Edmund Dowdeswell*.

If a Commissioner brought the commission, no oath was required of him, and the indorsement upon the commission then was, — “ 8 Nov. 1837, received by the hands of *A. B. Esq.*, one of the Commissioners.”¹ If the other party consented to waive the oath of the messenger, the depositions might have been sent up to the town agent, and by him left with his clerk in Court, who procured the opposite clerk in Court to indorse them as *received without oath of messenger*.²

Where a commission having been executed and sealed, &c., was delivered to a messenger who, by accident, lost it on the road, where it was picked up by two travellers, who brought it to one of the Masters ; upon their affidavit that they had not opened or altered the same, the Court made an order that the depositions should be received and deposited in the hands of the Six Clerk, and a rule to publish entered thereupon as if the depositions had been regularly returned.³

Where a commission to examine *de bene esse* and the depositions returned were completely lost, an order was made that the Commissioners, in whose custody the paper drafts of the depositions remained sealed, should return the same unopened, and that the same should be delivered to the Six Clerk unopened, and be engrossed, and that such engrossment should be filed and made use of as the original deposition might have been.⁴

When the commission was received by the clerk in Court, it was kept by him unopened till publication had passed.⁵

It is said, that a commission once issued cannot be discharged, except for irregularity, which must be certified by the Master upon a reference.⁶ But it seems, that if, from any cause not dependent upon the parties or upon one party more than another, the com-

¹ Hind. 352.

² 1 Smith's Ch. Pr., ed. 1838, 370.

³ Smales v. Chaytor, 1 Dick. 99.

⁴ Jones v. Darithome, 1 Dick. 352 ; see also Burn v. Burn, 3 Cox, 426.

⁵ Beames's Ord. 3, 221 ; Prac. Reg. 117.

⁶ Prac. Reg. 122.

mission cannot be executed, the Court will send down an Examiner into the country.¹

The rule with respect to costs, before the Orders of May, 1845, came into operation, was, that the acting Commissioners should be allowed *one guinea per diem* during the execution of the commission, exclusive of every other expense incident thereto.² The clerks were, in like manner, entitled to *half a guinea per diem*. The expenses and charges of entertainment, and other matters, were borne by the parties joining in and attending the execution of the commission. The expenses of the witnesses, if required, were always paid by the party producing them before they gave evidence.³

The expenses of a commission to examine witnesses may be very disproportionate where one party examines a great many witnesses, and the other party only a few; and were such expenses to be borne by the parties equally, great hardship might be borne by one of them. However, any difficulty of this nature may be obviated, by each party, at the commencement and during the execution of the commission, keeping his own Commissioners' clerks and witnesses separate from the others, and paying for their entertainment and charges only. A witness cross-examined under a commission thus conducted may be kept at the joint expense of both parties examining and cross-examining him; but if a party who insists upon cross-examining a witness needlessly defers the cross-examination, and detains the witness several days for that purpose, the party, examining such witness originally, may pay him his expenses and charges up to the conclusion of his examination in chief, and then the subsequent expense of the witness's detention for cross-examination must be borne by the party detaining him.⁴

The Orders of May, 1845, apply only to Commissioners to examine witnesses within the jurisdiction of the Court; but it sometimes happens, that witnesses, whose testimony is important to the

¹ 3 Prac. Reg. 126; Hind. 358.

² A *quantum meruit* lies for serving as a Commissioner upon a commission to examine witnesses, though it was objected that he acted by command of the Court *sed non allocatur*, because he is appointed at the nomination of the party, who ought to pay him if he employs him. *Stockhold v. Collington*, 1 Salk. 330; Carth. 208; Comb. 186.

³ Hind. 359.

⁴ Ibid.

parties in the cause, or some of them, reside abroad, or in some place out of the jurisdiction of the Court; in such cases a commission to examine witnesses abroad must be obtained.¹

Commissions of this description may be issued to take the depositions of witnesses in any country. Where the country in which the witnesses reside is at war with this, the usual practice appears to be, to direct it to the nearest neutral port;² but, in *Cahill v. Shepherd*,³ Lord Erskine made an order for a commission to examine witnesses to be directed to Seville, in Spain, although there was then a war between this country and Spain.

In *Gason v. Wordsworth*,⁴ the King of Sweden, to which country a commission was directed, refused to allow it to be executed, unless it was done by some magistrate there, according to the laws of Sweden; and Lord Hardwicke refused to direct any other commission into the same country, as there appeared to be no probability that any future commission there could be executed; his Lordship, therefore, ordered the depositions of the witnesses, which had been taken *de bene esse*, to be published.⁵

¹ The Practice in Chancery in the several States in relation to the issuing, execution, and return of commissions, is in general regulated by statute or by local rules, which could not usefully be set out in these notes. Many of the cases and rules will be found referred to in 2 Phil. Ev. (Cowen & Hill's notes,) p. 32 to 41, in note (42). See also 1 Greenl. Ev. § 320 to § 325; ante, 925, 935, 936, notes. Depositions in a foreign country must be taken by commission. *Stein v. Bowman*, 13 Peters, 209.

In New Jersey, when a cause is at issue, a commission for the examination of a witness out of the State may be applied for, either in vacation or in term time, upon affidavit stating that the witness is material, and that the party applying cannot safely proceed to a hearing of the cause without his testimony. A stipulated notice is to be given; and the name or names of the witnesses, their residence, and the name or names and residences of such person or persons as the party applying intends to nominate as Commissioner or Commissioners. Chancery Rule XIII. § 6.

In Massachusetts, the evidence in Equity is to be taken in the same manner as in suits at Law, and where the testimony of witnesses, residing out of the jurisdiction of the Court, is to be taken, the plaintiff is entitled to have a commission for that purpose; and all the rules of Law as to the time and manner of taking and filing depositions at Law, will apply in Equity. *Pingree v. Coffin*, 12 Cushing, 600.

² — *v. Romney*, 1 Amb. 62.

³ 12 Ves. 335.

⁴ 2 Ves. 325, 326; 1 Amb. 108, S. C.

⁵ See Belt's Supplement to Ves. 357.

A commission for the examination of witnesses abroad may be obtained by either party; but, like all commissions for the examination of witnesses, it never issues but by order of the Court.¹ This order may be obtained, by motion to the Court, upon notice supported by affidavit.²

Much discussion has taken place with regard to the nature of the affidavit which is necessary to entitle the party to obtain an order for a commission. According to the books of practice, all that need be stated in the affidavit is, that some of the witnesses, whose evidence will be material, and whom it will be necessary to examine on behalf of the party making the application, reside at —, (naming their place of residence,) and that the party cannot safely proceed to the hearing of the cause, without the testimony of those witnesses: and although in ordinary cases, where the application is made in a proper and early stage of the cause, the Court seldom or never denies making an order upon such an affidavit, yet it will exercise a discretion upon the subject.

Many doubts have been entertained, as to the necessity of stating in the affidavit the names of the witnesses, and the points as to which they are to be examined. By an Order of the Court, dated 26th of October, 1685, it is ordered, “that where any person, plaintiff or defendant, shall ground any motion or petition on an affidavit of material witnesses to examine, whereby to gain longer time to examine, such affidavit shall contain not only the names of the chiefest of such witnesses, but the points to which such witnesses are desired to be examined, to the end, that the Court may see whether such points be material to be examined, and whether before or after hearing.”³ And in *Oldham v. Carleton*,⁴ it was contended for and admitted to be necessary, that the affidavit should state the names of the witnesses to be examined.⁵

¹ Hind. 304. Where the commission becomes necessary in the prosecution of a reference to the Master, see *Bamford v. Bamford*, 2 Hare, 642.

² It is said that an order for a commission to examine witnesses abroad may be obtained either by motion in Court, or petition to the Master of the Rolls. See Hinde, 306, but the most usual course appears to be by motion; and where the bill is for a discovery and prays a commission, that is the only proper proceeding.

³ Beames's Ord. 265.

⁴ 4 Bro. C. C. 88; see also, *Anon.* 1 Vern. 334; *Moody v. Steele*, 2 Anst. 386; *Royal Exchange Assurance Company v. —*, 2 Russ. 553, n.; *Noble v. Garland*, ib. 544, n.

⁵ See also *Rougemont v. Royal Exchange Assurance Co.* 7 Ves. 304; *Shackell*

The question, whether it is necessary in the affidavit in support of a motion for a commission to examine witnesses abroad, to state the points as to which it is intended to examine them, is involved in the same uncertainty as the question regarding the insertion of their names. In *Oldham v. Carleton*,¹ which has been before referred to, it was contended that the application ought to be made on special grounds, showing in what points the evidence of the witness is material, and that, either in the pleadings or in the affidavit, the grounds ought to be stated; but the order was nevertheless made: and in *Rougemont v. The Royal Exchange Assurance Company*,² a similar order was made by Lord Eldon, though the points to which the witnesses were to be examined were not stated.³

The affidavit in support of an application for a commission to examine witnesses abroad, should be made either by the party himself or his solicitor,⁴ and therefore it was held, that the affidavit of an insurance broker, who had acted as agent for underwriters, who were sued on a policy, was insufficient.⁵

A plaintiff filing a bill for a commission to examine witnesses abroad is bound to make his application for the commission as soon as he can after he is in a situation to do so.⁶

Although where the bill merely prays a commission or a commission and injunction, without any other equitable relief, the application for a commission may be made at any time after the answer has been put in, or upon the defendant's being in contempt, or obtaining an order for further time; the rule is different when the bill prays equitable relief. In such cases the application ought not to be made till after the cause is at issue.

This distinction was clearly recognized by Lord Eldon, in *Noble*

v. Macauley, cited 6 Russ. 550, n.; 1 Bligh, N. R. 96; *Mendizabal v. Machado*, 2 S. & S. 483; *Carbonell v. Bessell*, 5 Sim. 636.

¹ 4 Bro. C. C. 88.

² 7 Ves. 304, [Sumner's ed. notes,] cited 2 Russ. 552.

³ See also *Mendizabal v. Machado*, 2 S. & S. 483; *Anon.* 1 Vern. 334; *Shedden v. Baring*, 3 Anst. 880; *Noble v. Corland*, 19 Ves. 372; *Coop.* 222; *Shackell v. Macauley*, 2 Russ. 550, n.; *Chitty v. Selwyn*, 2 Atk. 359; 1 Hoff. Ch. Pr. 474; *Schaffer v. Wilcox*, cited *Graham, Prac.* (2d ed.) 593; 2 Hall, 502; *Carbonell v. Bissell*, 5 Sim. 636.

⁴ *Laragoity v. Attorney-General*, 2 Pri. 172.

⁵ *Bonham v. Leigh*, 5 Pri. 444.

⁶ *Todd v. Alwyn*, 1 Sim. 271; *Hart v. Strong*, 2 Russ. 560.

v. Garland,¹ who, in his judgment, appears to have doubted the propriety of his own decisions in two cases which were cited before him, in which he had granted a commission before answer, although the bills prayed equitable relief.

It may be observed, that where, by the course of the Court, an account must necessarily be directed at the hearing, a commission to examine witnesses beyond sea will not be granted before hearing, where the effect of it will be to delay the decree directing the account; the proper time to apply for such a commission is after the account is directed.²

The order for a commission to examine witnesses abroad generally states the affidavit upon which it is made, and then gives the party applying for it *liberty to sue out a commission to examine witnesses (or one or more commission or commissions) at and and other places, returnable either without delay or on a general return day.*³ And that the defendant's solicitor do, in four days after notice thereof, join and strike Commissioners' names in such commission, (or in each of the said commissions), with the plaintiff's solicitor; or, in default thereof, that the said commission (or commissions respectively) be directed to the plaintiff's own Commissioners.

Sometimes it directs, *that in case the defendant shall join in such commission or commissions, he is to be at liberty to take out a duplicate or duplicates of such commission or commissions if he think fit.*⁴ And that, in such case, fourteen days' notice of the execution of such commission or commissions shall be deemed good notice to the defendants.⁵

Where the witnesses to be examined are foreigners and unacquainted with the English language, the following direction is usually added to the order: — “*And it is further ordered, that the Commissioners who shall execute the commission, or some person to be sworn by them truly to interpret the same to such of the said witnesses as can only speak in the* LANGUAGE, *do interpret the*

¹ *Ubi supra*; *Foderingham v. Wilson*, and *Yates v. Barker*, 19 Ves. 373, n. In *Cheminant v. De la Cour*, 1 Mad. 210, Sir Thomas Plumer, M. R., says, “It is clear that in those cases the commission was moved for after the time for answering had elapsed, for injunctions had been obtained for want of answer.”

² *Adam v. Bohun*, Barnard, 270.

³ Hind. 307. Without delay, is the better and most usual form.

⁴ 1 Hoff. Ch. Pr. 465.

⁵ Hand. 94; *Bowden v. Hodge*, 2 Swanst. 260.

*interrogatories, to be exhibited at the execution of the said commission to such witnesses, out of the English language into the language. And also the depositions of such witnesses as shall be examined thereon, out of the language into the English language. And it is also ordered, that such interpreter be also sworn to keep the said depositions secret until publication shall duly pass in the cause."*¹

The order being drawn up, passed and entered, must be served upon the adverse solicitor. After this, the adverse party is to be called upon to join in commission, and to strike Commissioners' names, and in default of the adverse party joining in commission, the commission is to be taken *ex parte*.² If the other party, after joining in commission, refuses to strike Commissioners' names, application must be made, by petition, to the Master of the Rolls, praying him to strike out two of the names.³ It may be mentioned in this place, that it is usual in commissions to examine witnesses abroad, to insert eight or more Commissioners' names; this is done to prevent all accidents which might prevent the execution of the commission, such as the absence or death of any of the Commissioners on either side.⁴

¹ See Mr. Belt's note to Lord Belmore *v.* Anderson, 4 Bro. C. C. 90; and Bowden *v.* Hodge, 2 Swanst. 260. In Gilpins *v.* Consequa, 1 Peters C. C. 85, it was held no objection, that the deposition was in English, though taken before Dutchmen, who did not appear to have been assisted by a sworn interpreter. See Amory *v.* Fellows, 5 Mass. 219.

² In New Jersey, if a party to whom notice is given of the intended application for a commission conclude to join in the commission, and to name any other Commissioner or Commissioners, he shall give notice to the adverse party, two days before the intended application, of the name or names and residence of the person or persons whom he proposes for a Commissioner or Commissioners, and the Chancellor shall appoint the Commissioner or Commissioners to execute the commission; and the party who shall first give notice of his intention to move for a commission, shall sue out and forward the same; but if he shall unreasonably delay to do so, the other party may forward it, and cause it to be executed and returned. Chancery Rule XIII. § 7. The name of every witness to be examined shall be inserted in the commission, and the interrogatories to be put to the witnesses annexed to the commission; and copies of the interrogatories shall be furnished to the opposite party, — that is to say, copies of all direct interrogatories shall be furnished six days, and copies of the cross-interrogatories, two days before forwarding the commission. *Ibid.* § 8.

³ 1 Har. (ed. Newl.) 244; Hind. 304.

⁴ In Pennsylvania, a commission was issued to four Commissioners, jointly, to take the depositions of witnesses in England. It was executed and returned by

A commission to examine witnesses abroad has not hitherto differed materially in form from a commission in England, unless it be a commission to examine foreigners in their own language, in which, instead of ordering that the oaths to be administered to the witnesses should be *upon the holy Evangelists*, directs that *the witnesses shall be examined on their respective corporal oaths, to be first taken before the Commissioners, or any two or more of them SOLEMNLY*.¹ The commission, also, after the usual directions, proceeds as follows,—“*And we do further give and grant unto you full power and authority, and we do by these presents command you, that you or any two or more of you do, after you have so entered upon the execution of this commission, swear one or more interpreter or interpreters, upon his or their corporal oath or oaths, well and faithfully to interpret the oath or oaths, and the interrogatories which shall be administered and exhibited by either party to any of such witnesses who do not understand the English language; and also to interpret their respective examinations and depositions taken to the said interrogatories. And we further command and direct that you or any two or more of you do certify to our Chancery in what manner the oath or oaths shall have been administered by you to the several witnesses respectively, who shall have been examined under the commission, and of what religion each and every of the said witnesses respectively is or are.*”²

The return of a commission to examine abroad, is regulated by the order for the commission, and may be either *without delay* or on a *general return day in term*, the former, however, is most usual and convenient.

A return without delay *ex vi termini* imparts no definite period three of the Commissioners only; two of whom, however, were of the defendant's nomination, and it was held inadmissible in evidence. *Guppy v. Brown*, 4 Dall. 410. See *Marshall v. Frisbie*, 1 Munf. 247. But depositions taken under a joint and several commission were held admissible, though the defendant's Commissioners did not attend. *Pennock v. Freeman*, 1 Watts, 401. Where a commission was directed to five persons, or any one of them, and the examination was taken in conjunction with another person, not named in the commission, the deposition was held inadmissible. *Willings v. Consequa*, 1 Peters C. C. 301. See further as to commissions, *Cage v. Courts*, 1 Har. & M'Hen. 239. A commission to take depositions, issued in blank as to the persons to whom directed, is inadmissible. *Worsham v. Goar*, 4 Porter, 441.

¹ Hind. 309; see *Rankissenseat v. Barker*, 1 Atk. 19.

² Ibid.; for a return under this part of the commission, see *Omychund v. Barker*, 1 Atk. 21.

wherein the party is restricted to return the commission, and in commissions of this nature, no restriction as to time is imposed, as it is in the case of ordinary commissions.¹ But this latitude of returning the commission must not be converted to oppressive purposes, and if the commission be not executed and returned within a reasonable time, due allowance being made for the distance and other concurrent circumstances of time and place, the Court, upon application by motion, will, if it appear that unnecessary or wilful delay has been occasioned, interfere; and probably, in a gross case, it will so far interfere, as to make an order upon the party to expedite and return the commission by a limited time; and, in default, order publication to pass and let the cause proceed to a hearing.²

Where a commission is made returnable on a general return day in term, the return is usually settled by the solicitors, or by the Court if they differ. The return in such cases, must be made to depend upon the distance of the place where the execution of the commission is to be had.³

With respect to the execution of a commission to examine witnesses abroad, it is in general similar to the manner in which a commission is executed in England; so that it is only necessary to refer the reader to what has before been written on the subject, and to point out a few particulars which cause a difference in the practice.

In the first place it is to be observed, that as the witnesses are resident out of the jurisdiction of the Court, no compulsory process can be resorted to for the purpose of compelling their attendance to be examined; (except in the case of commissions directed to the Judges of the Courts in the East Indies, under the 13 Geo. III. c. 63, s. 44, before referred to, where the witnesses are amenable to the process of those Courts;) therefore no subpoena can be issued for that purpose. All, therefore, that can be done is to summon the witnesses by notice or letter.

Where the adverse party resides in England, it would, in most

¹ *Wake v. Frankling*, 1 S. & S. 97.

² *Hind*. 307.

³ *Ibid.* See *Coles v. Thompson*, 1 Caines, 517; *Hesketh v. Mulock*, cited *Graham Prac.* (2d ed.) 601. In the Court of Chancery it seems, that where a commission to examine witnesses has not been returned, it will be necessary to make an application to the Court to extend the time for closing the proofs; otherwise, they can be closed, as in ordinary cases. *Barrett v. Pardow*, 1 Edw. Ch. 11.

cases, be impossible to give him such notice of the time and place of executing a commission abroad as is essentially necessary to the regular execution of a commission to examine witnesses in England ; such notice, therefore, is usually dispensed with, the Court, from the emergency of the occasion, substituting notice to the adverse party's Commissioners or to his agent, in lieu of notice to the party himself.¹ For this purpose, the order for the commission, besides directing the adverse party, within a limited time, to join and strike Commissioners' names, *directs him to name an agent in the place where the commission is to be executed, to whom notice of the execution of the commission is to be given, and orders, that service of the notice upon such agent shall be good service, and that in default of joining in commission or naming an agent, the commission shall issue ex parte.*

Sometimes the order does not direct the adverse party to name an agent ; in such case, it seems necessary that the party applying for the commission should make a subsequent application, by motion or petition at the Rolls, for an order as of course, that he may be at liberty to serve any one or two of the adverse party's Commissioners with notice of the execution of the commission.

Where a commission had been issued to examine witnesses abroad, the plaintiff, after the Commissioners' names had been struck, moved that he might be at liberty to serve any one or two of the defendant's Commissioners with notice of the execution of it, when it was alleged on the other side that the rule of the Court was, that the plaintiff should serve such two of the defendant's Commissioners as the defendant should choose ; but Lord Hardwicke ordered, that the plaintiff should be at liberty to serve any two of the defendant's Commissioners, observing, that the rule never could be as laid down, because it would be attended with this inconvenience, that, if the two particular Commissioners chosen by the defendant should happen to be absent from the place appointed

¹ Ibid. 362. No notice of the time and place of executing a commission out of the State is necessary to be given to the opposite party in Maryland. *Owings v. Norwood*, 2 Har. & John. 96. But time should be given, to allow the opposite party to exhibit interrogatories. *Ib.* The services of copies of the interrogatories, which accompany a commission, on the adverse party, a sufficient time before the issuing of the commission, to enable him to file cross-interrogatories, is sufficient notice of the issuing of the commission, and of the time and place of executing it. *Law v. Scott*, 5 Har. & John. 438.

for the execution of the commission, or either of them should be dead, it could not be executed.¹

The label to the commission, in general, points out the person or persons to whom the notice of the commission is to be given.²

The examination and cross-examination of the witnesses under a commission to examine abroad, are subject to the same rules and regulations as examinations under commissions in England³ or before the Examiner.⁴ The return must also be made in the same manner. Where any oaths other than the ordinary Christian oaths have been administered to the witnesses, the return must state in what manner the oaths have been administered, and of what religion such witnesses are.⁵

It may be noticed, in this place, that, under a commission to examine witnesses who cannot speak English, the usual and proper course is to take down the depositions from the interpreter in English.⁶ This, however, does not appear to be absolutely necessary, since, in some cases, examinations taken down in a foreign language have been recognized by the Court. If the depositions are taken down in the language of the witness, they must afterwards be translated, out of that language into English, by a person appointed by the Court for such purpose, who must be sworn to the truth of his translation,⁷ and must attend at the office for the purpose of making it, for the Court will not make an order for the record of the depositions to be delivered out, in order that they may be translated.⁸

The translation, after the truth has been sworn to, is annexed to the record, and an office copy made of it, which will be permitted

¹ Anon. 3 Atk. 633.

² Hind. 310.

³ Ante, pp. 933, 934.

⁴ Ibid. p. 933. Under the New York Act of 17th of April, 1823, parties and their counsel have a right to be present at the examination of witnesses and to cross-examine in all cases; and this as well upon commissions issued to examine witnesses out of the State as in other cases. *Steer v. Steer*, Hopk. 362. See *Wiggins v. Pryor*, 3 Porter, 431, cited ante, 936 note. For the practice in New Hampshire on this subject see *Marston v. Brackett*, 9 N. Hamp. 345, 346, cited ante, 889, note.

⁵ *Omychund v. Barker*, 1 Atk. 21, and ante, p. 948.

⁶ *Lord Belmore v. Anderson*, 4 Bro. C. C. 90.

⁷ 1 Newl. Ch. Pr. 279.

⁸ *Fauquier v. Tynte*, 7 Ves. 292. See *Gilpins v. Consequa*, 1 Peters C. C. 85, cited ante, 947, note.

to be read at the hearing; an order for that purpose having been previously obtained, which is usually applied for at the same time that the application is made for the appointment of a person to translate the depositions.¹

Where a commission has been executed abroad, the person who takes it out and returns it ought to make affidavit that he received it from the Commissioners;² in an old case, however, leave was given to send and return a commission by the post;³ and in another, where the messenger who brought the commission from abroad, being detained in quarantine after his arrival in this country, sent it up by the coach to the solicitor in London, the seal being still unbroken, it was received.⁴

Where a commission for the examination of witnesses in Lisbon was executed, and forwarded with the depositions to England, but the ship in which they were sent was lost on the passage, the Court ordered the Commissioners, or any two of them, to transmit the *drafts* of the depositions, and to certify the circumstances of the return of the commission, but would not make any order for reading the drafts of the depositions, &c., at the hearing of the cause, until after the Commissioners had made their return and certificate.⁵

It seems that a commission to examine witnesses abroad will not be affected by an abatement of the suit; and that depositions taken under it (provided neither Commissioners nor the witnesses have received notice of the abatement) will be good evidence.⁶

The rule as to the costs of a commission to examine witnesses abroad is, that they are to be borne by the party obtaining it; but that if the opposite party examines under it in chief, he must bear his proportionate share.⁷ The costs of a solicitor attending the execution of a commission abroad will not be allowed in taxation.⁸

¹ 1 Newl. Ch. Pr. 279.

² *Bourdillon v. Alleyne*, 4 Bro. C. C. 100.

³ *Newland v. Horsman*, 2 Ch. Ca. 74. See *Winston v. Miller*, 1 Stew. 508.

⁴ *Bourdieu v. Trial*, 2 Fowl. Ex. Pr. 80. When a commission from the Court of Chancery to take testimony is returned, it is opened by the Chancellor or his registrar, and objections of every kind are taken and considered at the hearing of the cause. *Strike v. McDonald*, 2 Harr. & Gill. 192.

⁵ *Burn v. Burn*, 2 Cox, 426; see also *Jones v. Donithorne*, 1 Dick. 352.

⁶ *Thompson's Case*, 3 P. Wms. 195; *Winter v. Dancie*, Toth. 99.

⁷ *Jackson v. Strong*, 13 Pri. 309.

⁸ *Hamond v. Wordsworth*, 1 Dick. 381.

Letters Rogatory. — Where the government of a foreign country, in which the witnesses proposed to be examined reside, refuses to allow the Commissioners to administer oaths to such witnesses, or to allow the commission to be executed, unless it be done by some magistrate or judicial officer there, according to the laws of that country, letters rogatory must be issued.¹ By these letters, the Court abroad is informed of the pendency of the cause, and the names of the foreign witnesses, and is requested to cause their depositions to be taken, in due course of law, for the furtherance of justice, with an offer, on the part of the tribunal making the request, to do the like for the other in a similar case. The writ or commission is usually accompanied by interrogatories, filed by the parties on each side, to which the answers of the witnesses are desired. The commission is executed by the Judge who receives it, either by calling the witness before himself, or by the intervention of a Commissioner for that purpose; and the original answers, duly signed and sworn to by the deponent, and properly authenticated, are returned with the commission to the Court from which it issued.² A special application must be made to the Court, to obtain an order for letters rogatory, and they would, it seems, be issued in the first instance without sending a previous commission, upon satisfactory proof that the authorities abroad would not permit its execution.³

¹ These letters are sometimes called *requisitory*. *Nelson v. United States*, 1 Peters C. C. 236. Commissioners are not allowed to administer an oath to witnesses in the Island of St. Croix. *Lincoln v. Battelle*, 6 Wendell, 476. So in Havana. *Nelson v. United States*, *supra*. And in Sweden. *Gason v. Wordsworth*, 2 Ves. Sen. 336.

² 1 Greenl. Ev. § 320.

³ 1 Hoff. Ch. Pr. 482. The following form may be found in 1 Peters C. C. 236, note (a):—

UNITED STATES OF AMERICA, District of _____, ss.

The President of the United States, to any Judge or tribunal having jurisdiction of civil causes, in the city (or province) of _____, in the kingdom of _____, Greeting: *

[L.S.] Whereas, a certain suit is pending in our _____ Court, for the District of _____, in which A. B. is plaintiff [or claimant, against the ship _____,] and C. D. is defendant, and it has been suggested to us that there are witnesses, residing within your jurisdiction, without whose testimony justice cannot completely be done between the said parties; We therefore request you, that in furtherance of justice, you will by the proper and usual process of your Court, cause such witness or witnesses, as shall be named or pointed out to you by the said parties, or either of them, to appear before you or some

SECTION IV.

Of the Examination of Witnesses — de bene esse.

THE practice of examining witnesses *de bene esse* is an old one in the Court of Chancery. The value of the practice is most materially diminished in consequence of the changes in modern practice, by the operation of which the length of time intervening between the institution of a suit and its coming to an issue is most materially abridged. Still the practice is not quite obsolete and has never been repealed; consequently, a few words must be devoted to an explanation of it. The practice is derived from the Civil Law.

The examination of a witness *de bene esse* takes place where there is danger of losing the testimony of an important witness from death, by reason of age (as where the witness is seventy years old and upwards;¹ or dangerous illness;² or where he is the only witness to an important fact;³ in such cases the Court, to prevent the party from being deprived of the benefit of his evidence, will permit his examination to be taken before the cause is at issue, in order that, if the witness die, or be not forthcoming to be examined after issue joined, the examination so taken may be used at the hearing.⁴

competent person, by you for that purpose to be appointed and authorized, at a precise time and place by you to be fixed, and there to answer on their oaths and affirmations, to the several interrogatories hereunto annexed; and that you will cause their depositions to be committed to writing, and returned to us under cover, duly closed and sealed up, together with these presents. And we shall be ready and willing to do the same for you in a similar case, when required. Witness, &c.

¹ *Rowe v. —*, 13 Ves. 261; *Lingan v. Henderson*, 1 Bland, 238; *McKenna v. Everitt*, 2 Beav. 188; *Ails v. Sublit*, 3 Bibb. 204.

² *Bellamy v. Jones*, 8 Ves. 31. See *Clark v. Dibble*, 16 Wendell, 601.

³ *Shirley v. Earl Ferrers*, 3 P. Wms. 77; *Pearson v. Ward*, 2 Dick. 648; *Brydges v. Hatch*, 1 Cox, 423. In *Earl Cholmondeley v. The Earl of Orford*, 4 Bro. C. C. 157, two witnesses were ordered to be examined *de bene esse*, being the only persons who knew material facts.

⁴ Hind. 368. 2 Phil. Ev. (Cowen & Hill's notes,) note (42) pp. 38 and 39, and cases cited; 2 Story Eq. Jur. § 1513 to 1516; Story Eq. Pl. § 307 to 310. By the 70th Equity Rule of the United States Courts, it is provided that "After any bill is filed, and before the defendant hath answered the same, upon affidavit made, that any of the plaintiff's witnesses are aged, or infirm, or going out of the country, or that any of them is a single witness to a material fact, the

The examination of witnesses *de bene esse* must be distinguished from the practice of suits to perpetuate testimony. The former may be incidental to every suit, whereas the examination for the purpose of perpetuating the testimony is the fruit of a suit instituted for that particular purpose ; it may even be incidental to a suit to perpetuate testimony, where there is danger that the evidence of the witnesses whose testimony is intended to be perpetuated being lost before the suit for perpetuating is ripe for a regular examination.¹

It is to be observed, that, in general, the Court has not allowed the examination of a witness *de bene esse*, with a view to ulterior proceedings, such as the trial of an issue.² The changes, however, both in the practice of Common Law Courts and in Equity make the old cases scarcely applicable.

The cases in which the Court has made an order for the examination of witnesses *de bene esse* were not confined to those of age or sickness, or in which the witness is the only person who can speak to the fact intended to be proved. The Court has given permission for such an examination of witnesses in other cases which come within the same principle ; indeed it did so wherever the justice of the case appeared to require it. Thus where an application was made to examine the surviving witness to a will *de bene esse*, on the ground that the parties concerned all lived in America, and that the surviving witness was ill, the order was made, although the witness was not stated to be more than “ upwards of sixty years old.”³

The Court, however, will not permit the examination of witnesses *de bene esse*, on the ground of their being about to go abroad, where it is in the power of the party applying to detain them till they had been examined in the ordinary course.⁴

clerk of the Court shall, as of course, upon the application of the plaintiff, issue a commission to such Commissioner or Commissioners, as a Judge of the Court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking the testimony.”

¹ *Frere v. Green*, 19 Ves. 319.

² *Palmer v. Lord Aylesbury*, 15 Ves. 299 ; *Anon.* cited by Lord Eldon, *ibid.* ; *Anon.* 6 Ves. 573 ; *Forsyth v. Ellice*, 2 Mac. & Gor. 209.

³ *Fitzhugh v. Lee*, 1 Amb. 65 ; but in such cases an *ex parte* order is irregular ; see *M’Kenna v. Everitt*, 2 Beav. 188 ; and see *Jepson v. Greenaway*, 2 Fowl. Ex. Pr. 103 ; *M’Intosh v. Great Western Railway Company*, 1 Hare, 328.

⁴ *The East India Company v. Naish*, Bunb. 320. Where a witness is about to

It seems, also, that, in a question of pedigree, where the case depends upon a chain of distinct circumstances in the knowledge of different individuals, the death of one of whom would destroy the whole chain, the Court have permitted the examination of such individuals *de bene esse*, although none of them came within the description of witnesses whose testimony was in danger of being lost either from age or serious illness.¹

The rule, however, that the examination of a witness *de bene esse* will be permitted where the individual proposed to be examined is the only witness, will not be extended to cases where there is more than one witness to the same fact, unless upon the ground of the age or infirmity of the witness.²

The same rules which applied to the examination of parties to the record in ordinary course, were applicable to their examination *de bene esse*; consequently it is presumed that the new practice would apply to them.³

A defendant, although he may, equally with the plaintiff, examine a witness *de bene esse*,⁴ could not obtain an order for that purpose before he had put in his answer.⁵

The application for leave to examine a witness *de bene esse*, must, in every instance, whether made by petition at the Rolls or by motion to the Court, with notice or without, be supported by an affidavit of the facts which form the ground of the application, depart from the State, to reside abroad, the Court, on petition, verified by affidavit and motion for that purpose, will order him to be examined *de bene esse*, without previous notice of the motion. *Rockwell v. Folsom*, 4 John. Ch. 165. In South Carolina, an attorney, prevented from being a witness by duties in another Court, may be examined *de bene esse*, by commission. *Huffman v. Barkley*, 1 Bailey, 34. So if the witness is going from one State to another. *Story Eq. Pl.* § 308.

¹ *Shelley v. —*, 13 Ves. 56. See also *Shirley v. Earl Ferrers*, 3 P. Wms. 77.

² *Anon.* 19 Ves. 321; *Mayor, &c. of Colchester v. —*, 1 P. Wms. 595; *Brown v. Greenly*, 2 Dick, 504.

³ *Forbes v. Forbes*, 9 Hare, 461.

⁴ *Williams v. Williams*, 1 Dick. 92; *Sheward v. Sheward*, 2 V. & B. 116.

⁵ *Williams v. Williams*, *ubi supra*; *Forbes v. Forbes*, 9 Hare, 461. But the Court will order a witness to be examined *de bene esse* in a cause, on the application of the plaintiff, before an answer has been put in, provided the necessity for taking his deposition is satisfactorily shown by affidavit; *Fort v. Ragusin*, 2 John. Ch. 146; see *Bown v. Child*, 3 Sim. 457; and even before appearance, provided the defendant has been served with a subpœna. *Wilson v. Wilson*, cited 1 Newl. Ch. Pr. 287. See *Allen v. Annesley*, 2 Jones Exch. 260; *Dew v. Clarke*, 1 S. & S. 108.

such as the age of the witness, &c., and that he is a material witness for the party making the application.¹ Where an application is made for an order to examine a witness on the ground that he is the only person who knows the fact, the affidavit should state the particular points to which his evidence is meant to apply;² and it should be shown, not only that the witness is a person who knows the fact, but that he is the *only person* who knows it, and the affidavit should also show the ground which the person who makes it has for believing that the witness is the only person.³

The order to examine witnesses *de bene esse*, gives liberty to examine such and such witnesses *nominatim*, and will only authorize the examination of the persons named therein. Where it is obtained, without notice, after appearance, it must be served upon the solicitor on the other side. Where it has been obtained before appearance, so that there is no adverse solicitor upon whom it can be served, it must be served on the adverse party himself, for which purpose the order usually directs that "notice of the order be given to the defendants respectively, or a copy thereof left at their dwelling-houses or usual places of abode, with their servants, agents, or other persons residing there, ten days at least before the examination of the witness."⁴

With respect to the costs of examinations *de bene esse*, no specific rule appears to have been laid down which makes any distinction between them and the costs of examinations under ordinary circumstances, except, indeed, in the case of bills filed for the purpose of having witnesses examined *de bene esse*, in order to render their evidence available on a trial at Law. In such cases, it is presumed, the costs must be regulated by the rule of the Court with regard to bills of a similar description, viz., bills to examine witnesses *in perpetuam rei memoriam*, in which case a defendant is entitled to apply for his costs immediately after the examination of

¹ See *Rockwell v. Folsom*, 4 John. Ch. 165; Story Eq. Pl. § 309.

² *Pearson v. Ward*, 1 Cox, 177; 2 Dick. 648, S. C.; *Hope v. Hope*, 3 Beav. 317.

³ *Rowe v. —*, 13 Ves. 261. See also *Pearson v. Ward*, cited 1 Harr. ed. Newl. 278. See *Grove v. Young*, 3 De G. & Sm. 398. The affidavit should give the place of residence and description of the witnesses whom it is sought to have examined *de bene esse*. *O'Farrel v. O'Farrel*, 1 Moll. 364.

⁴ The statute of Illinois authorizes a person filing a bill, before issue joined, to take depositions substantiating its averments; and without an order to that effect, he may proceed to take his depositions *de bene esse*. *Doyle v. Wiley*, 15 Ill. 576.

the witnesses has been perfected, upon the simple allegation that he did not examine any witnesses himself.¹

SECTION V.

Demurrers by Witnesses.

WE have seen² that a witness is still able to protect himself from answering a question to which he has a legal objection by demurrer.³

The grounds upon which a witness may protect himself from answering to interrogatories are nearly the same as some of those which a defendant has a right to insist upon as a reason for not giving the discovery required by a bill.⁴ These are, principally: That they may subject the witness to pains and penalties, or to a forfeiture, or something in the nature of a forfeiture; or, that the witness cannot answer the interrogatory without a breach of professional confidence.

1. With respect to the first ground of objection to interrogatories by a witness, namely, *that the answer to them may expose him to pains and penalties, or to a forfeiture, or something in the nature of a forfeiture*, the reader is referred to a former part of this Treatise,⁵ where the privilege of a defendant to be protected from making the discovery required by the bill on this ground has been discussed. He will there find, that the privilege in such cases arises from an acknowledged principle of Law, that no man is bound

¹ Foulds v. Midgley, 1 V. & B. 138.

² Ante, p. 890.

³ A witness may, on assigning cause, demur to the questions propounded to him; upon which the examination must be suspended until the Court decides. *Winder v. Diffenderffer*, 2 Bland, 166. Counsel have no right to advise a witness that he is not bound to answer a particular interrogatory. It is the duty of the Examiner to inform a witness of his legal rights. *Taylor v. Wood*, 2 Edw. Ch. 94; 1 Hoff. Ch. Pr. 466. A witness who demurs to a question, is not the proper person to bring it before the Court. If the party putting the question does not ask for an attachment, nor in any way bring the point before the Court, no one else can. The question will be considered as waived, or the demurrer well taken unless he who puts the question persists in it, and takes measures to have the demurrer disposed of. *Mowatt v. Graham*, 1 Edw. Ch. 13.

⁴ See ante, p. 589.

⁵ Ante, p. 589. See also *Phil. & Amos*. 913.

to answer so as to subject himself to punishment ; and as this principle is applicable as well to witnesses as to defendants, the rules which he will there find laid down with regard to its application to the latter case will be equally applicable to the former.

It was at one time a doubt whether a witness, not a party to the suit, could object to answer a question, on the ground that the answer might subject him to a civil suit.

2. To settle the law on this subject the statute 46 Geo. III. c. 37, was introduced, which declares, "That a witness cannot legally refuse to answer a question relevant to the matter in issue, (the answering of which has no tendency to accuse himself, or to expose him to a penalty or forfeiture of any nature whatever,) on the ground that the answering such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit."

Until recently this objection, though not valid to an ordinary witness, was valid to a party of the suit, but the recent Act¹ has now made parties to the suit competent and compellable to give evidence.

3. The rules of exemption from discovery *on the ground of professional confidence*, proceed upon the same principles as are applicable to the case of defendants ; and the reader is therefore referred for information upon this head to a former portion of this Treatise, where these rules have been discussed with reference to the protection of a defendant from answering the bill.² It may, however, be noticed in this place that, when the objection on this ground does not proceed from the witness, but from the party aggrieved, the way in which the party must proceed to obtain relief is to move the Court to inquire which of the matters in the deposition came to the witness's knowledge as confidential attorney or solicitor, &c., and, upon the report, to suppress the depositions.³

It would appear, from the old practice, that where a witness is served with a *subpœna duces tecum* to produce a deed or other document, upon being asked *vivâ voce* to produce it, he objects to do so, either upon the ground of his having an interest in the deed, or upon any other ground,⁴ he may refuse to do so without a for-

¹ Ante, p. 884.

² Ante, pp. 598, 599. See also *Parkhurst v. Lowten*, 2 Swanst. 195.

³ *Sandford v. Remington*, 2 Ves. jr. 189.

⁴ Such as, that the production of it may prove him to be guilty of a crime. See *Parkhurst v. Lowten*, 2 Swanst. 213.

mal demurrer. The proper course to be adopted by the party in such case was, to move that the witness might attend and produce the deed, and pay the other party the costs occasioned by his previous refusal; upon the hearing of which motion, the Court decided whether the reasons alleged by the witness, for his refusal, were satisfactory or not.¹

There does not appear ever to have been any particular form for a demurrer of this nature.² It would appear to be sufficient that the witness should state clearly the grounds of his refusal to answer the question, and the examiner will report it to the Court.

Thus a witness, demurring on the ground that his answer would violate the confidence reposed in him as a solicitor, must name the party to whom he was solicitor.³ He must also swear that the facts, from the discovery of which he desires to be protected, came to him in his capacity of solicitor to a particular person; "for a solicitor, like any other witness, is bound to discover all secrets of his client which he did not come to the knowledge of in his relation of solicitor to his client."⁴ It must also appear, that the knowledge came to him in the character of a professional adviser, and in such character only; and therefore where a demurrer stated that the witness was the attorney or *agent* for a person, it was considered not to be sufficiently precise, for an agent may be only a steward or servant.⁵

So, where a witness demurred to an interrogatory, because she claimed an interest in the land; it was disallowed, because she did not answer to the interest, nor state what interest she claimed.⁶

In taking down a demurrer, the examiner ought to take the witness's statement upon oath.⁷ Where this is not done, the demurrer must be supported by affidavit, as it is necessary the Court should, in some way or other, have the sanction of an oath to the facts on which the objection is founded.⁸

¹ *Bradshaw v. Bradshaw*, 1 R. & M. 358.

² *Morris v. Williams*, 2 Moll. 362.

³ *Parkhurst v. Lowten*, 2 Swanst. 201.

⁴ *Morgan v. Shaw*, 4 Mad. 54.

⁵ *Vaillant v. Dodemead*, 2 Atk. 525; *Strathmore v. Strathmore*, 11 Law J. Rep. (N. S.) Chan. 215.

⁶ *Jefferson v. Dawson*, 2 Cha. Ca. 208. See also *Herbert v. Mayn*, 2 Swanst. 198, note.

⁷ *Parkhurst v. Lowten*, 2 Swanst. 203.

⁸ *Ibid.* See *Kirkwood v. Lyons*, 1 Hogan, 116.

If the Court, upon argument, considers the demurrer to be bad, it will overrule it; in which case an order will be made that the witness, if the examination has been in town, may go before the Examiner, and be examined, or stand *committed*.¹

The costs of a demurrer to interrogatories appear to have been governed by the same rules as those of demurrers to bills; and, formerly, if they were overruled, the same sum, viz. 5*l.*, was allowed to the other party for costs, as in the case of ordinary demurrers.² It has, therefore, been held, that the 32d Order of 1828,³ applies to demurrers of this nature.⁴ And in the case of *Strathmore v. Strathmore*,⁵ upon the overruling of a demurrer put in by a witness, Sir J. L. Knight Bruce, V. C., ordered the costs to be paid by the witness.

In *Davis v. Reid*, where a demurrer was partially allowed, Sir L. Shadwell directed, that half the costs should be paid by the witness, in analogy to the practice when two exceptions are taken, one of which succeeds and the other fails.

In former Treatises it has been usual to devote a considerable space to an explanation of the practice concerning the suppression of depositions. As, according to the present practice, the examination is conducted by the Examiner, and many of the objections formerly applicable to evidence are abolished, it can scarcely happen that cases for the suppression of depositions will occur hereafter, and therefore the subject will be very cursorily alluded to.

The ground upon which the Court suppressed depositions has been either that the interrogatories upon which they were taken were leading; or that the interrogatories and the depositions taken upon them, or the depositions alone, were *scandalous*; or else that some irregularity has occurred in relation to them.⁶ A deposition

¹ *Parkhurst v. Lowten*, 2 Swanst. 202.

² *Parkhurst v. Lowten*, *ubi supra*; *Shepherd v. Downing*, 2 Swanst. 195, note; *Vaillant v. Dodemead*, 2 Atk. 592.

³ *Ante*, p. 629.

⁴ *Sawyer v. Birchmore*, Law J. XIII. p. 249.

⁵ 11 Law J. Rep. (N. S.) Chan. 215.

⁶ See 1 Hoff. Ch. Pr. 495; *Underhill v. Van Cortlandt*, 2 John. Ch. 345; *Stubbs v. Burwell*, 2 Hen. & Munf. 536; *Pillow v. Shannon*, 3 Yerger, 508; *Gresley Eq. Ev.* (Am. ed.) 147 to 154; *Ringgold v. Jones*, 1 Bland, 90; *Perine v. Swaine*, 2 John. Ch. 475; *Hemphill v. Miller*, 16 Ark. 271. It is a fatal defect, if the general interrogatory, "Do you know anything further," &c. does not appear to be answered. *Richardson v. Golden*, 3 Wash. C. C. 109; *ante*, 913,

may also be suppressed, because a witness has disclosed some matter which has come to his knowledge as solicitor or attorney for the party applying.¹

The objection that the interrogatories are leading can scarcely now be taken, as the Examiner himself either puts the questions, or controls those by whom the witnesses are examined.

Formerly, when any valid objection could be taken to the depo-

note. So if the deposition is taken before persons not named in the commission. *Banert v. Day*, ib. 243. So if all proper interrogatories do not appear to have been answered, on each side, substantially. *Bell v. Davidson*, ib. 328; *Nelson v. United States*, 1 Peters C. C. 235. A deposition was rejected because a witness refused to answer a proper question; also because it was in the handwriting of the plaintiff's attorney. *Mosely v. Mosely*, Cam. & Nor. 522. Depositions taken without notice will be rejected. *Honore v. Colmesnil*, 1 J. J. Marsh. 525. So a deposition taken after argument of the cause, without special order, will be suppressed. *Dangerfield v. Claiborne*, 4 Hen. & Munf. 397. Evidence of a fact not in issue, may, upon motion, before the hearing, be suppressed, or it may be rejected at the hearing. *Trumbull v. Gibbons*, Halst. Dig. 174. See *Butman v. Ritchie*, 6 Paige, 390. According to the practice pursued in New York by Chancellor Kent, motions to suppress depositions, although permitted to be made before the hearing, usually resulted, unless the point was very clear, in permitting the evidence to stand *de bene esse*, and reserving the question. 1 Hoff. Ch. Prac. 495. "The question, whether the deposition shall be suppressed," it was remarked by the Chancellor in *Underhill v. Van Cortlandt*, 2 John. Ch. 345, "is a matter of discretion; and in *Hammond's Case*, Dickens, 50, and in *Debrox's Case*, cited in 1 P. Wms. 414, the deposition of a witness examined after publication, was admitted in the one case, because the opposite party had cross-examined; and in the other, because the testimony would otherwise have been lost forever." A deposition having been taken after a cause was set down for hearing in the Superior Court of Chancery, and no objection having been made in that Court, the Court of Appeals will presume that good cause was shown for admitting it. *Stubbs v. Burwell*, 2 Hen. & Munf. 536; *Pillow v. Shannon*, 3 Yerger, 508. Exceptions to the reading of depositions taken by virtue of commissions issued after the cause in which they may be required is set down for hearing, may be made at any time before the cause is gone into, when called; after which such exceptions would come too late. *Foster v. Sutton*, 4 Hen. & Munf. 401. See further as to irregularities in taking, &c. depositions, and when they will or will not cause their rejection, *Gresley Eq. Ev.* (Am. ed.) 147 to 154; *Cravens v. Harrison*, 3 Litt. 92; *Clarke v. Tinsley*, 4 Rand. 250; *Stubbs v. Burwell*, 2 Hen. & Munf. 536; *Ringgold v. Jones*, 1 Bland, 90; *Perine & Swaine*, 2 John. Ch. 475; *Underhill v. Van Cortlandt*, 2 John. Ch. 345. A party is too late to move to suppress a deposition for irregularity after having exhibited articles to discredit the witness. *Malone v. Morris*, 2 Moll. 324.

¹ *Sandford v. Remington*, 2 Ves. jr. 189; *Bernard v. Papineau*, 3 De G. & Sm. 498; *Attorney-General v. Dew*, 3 De G. & Sm. 493.

sitions, it was the practice to move for a reference to the Master, and upon his report to move to suppress the depositions. Now that the Master's office is abolished, the proper course would be to move the Court at once, if any such objection could be taken, for an order to suppress the depositions.

SECTION VI.

Publication.

PUBLICATION, in a legal sense, is the open showing of depositions, and giving copies of them to the parties, by the clerks or Examiners in whose custody they are.¹

By the Orders of the Court the depositions of witnesses are not to be disclosed by any of the persons before whom they were taken, or by their clerks, but are to be closely kept, if taken in town, by the Examiners at their office ; if by Commissioners in the country, by the sworn clerk to whom the commission, after its execution, was delivered, until publication passes.

We have seen that now, under the Orders of May, 1845, publication is to pass without rule or order on the expiration of two months after the filing of the replication, unless such time expires in the long vacation or is enlarged by order.² And that if the

¹ Prac. Reg. 353.

² 111th Order, May, 1845. In Massachusetts, the opening and filing, in the Clerk's office, a deposition taken in a suit in Chancery, is equivalent to a publication in the English practice. A particular rule for publication is not necessary. *Charles River Bridge v. Warren Bridge*, 7 Pick. 344. In Maryland there is no publication of depositions, but all objections are open, and may be taken at the hearing. *Strike's Case*, 1 Bland, 96. By Rule 69 of the Equity Rules of the Supreme Court of the United States, it is provided that, "immediately upon the return of the commissions and depositions containing the testimony, into the Clerk's office, publication thereof may be ordered in the Clerk's office by any Judge of the Court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances. But by consent of the parties, publication of the testimony may at any time pass in the Clerk's office, such consent being in writing, and a copy thereof entered in the order book, or indorsed upon the deposition or testimony." A commission may be opened by a Judge in vacation in New Jersey. *Den v. Wood*, 5 Halst. 62. It is a fatal objection to a deposition taken under the Judiciary Act of 1798, ch. 20, § 30, that it was opened out of Court. *Beale v. Thompson*, 8 Cranch, 70. A deposition opened

two months after the filing of the replication expire in the long vacation, publication is to pass on the second day of the ensuing Michaelmas Term, unless the time is enlarged by order.¹ And that, "if the time is enlarged by order, publication is to pass without rule or order, on the expiration of the enlarged time, unless the enlarged time expires in the long vacation, in which case publication is to pass without rule or order on the second day of the ensuing Michaelmas Term, unless the time is further enlarged by order."²

As these Orders fix precisely the time at which publication is in all cases hereafter to pass, it will not be necessary to enter at length into the details of the practice by which the time of publication has hitherto been determined.

It is desirable, however, to state that before these Orders came into operation publication passed either by consent or rule.

A rule to pass publication was in the nature of an order of the Court, directing that publication should pass unless cause was shown by the other side. Before a rule to pass publication could be entered, it was necessary, in most cases, that there should have been a previous order or rule, called a *rule to produce witnesses*. This rule, which was in fact, a notice given by one side to the other to proceed with the examination of his witnesses, was sometimes called the *ordinary rule*.

When witnesses were examined *in Court*, two rules were necessary for publication, viz., an ordinary rule, and then a day to show cause why publication should not pass.³ So also in cases where a commission issued, but which came under the 17th Order of 1828,⁴ two rules were necessary. When, however, the case did not come within the 17th Order of 1828, and a commission issued, only one rule to pass publication was necessary.

When the prescribed period from the date of the rule to pass publication expired, publication passed as of course, unless the by mistake out of Court, may be received and filed in Maine on affidavit of the fact. *Law v. Law*, 4 Greenl. 167. In Massachusetts, a deposition taken under a commission, so opened, may be used in the discretion of the Court, notwithstanding the rule, that "all depositions shall be opened and filed with the Clerk." *Burrell v. Andrews*, 16 Pick. 551; *Goff v. Goff*, 1 Pick. 475.

¹ 112th Order, May, 1845.

² 113th Order, May, 1845. *Moody v. Payne*, 3 John. Ch. 294.

³ Beames's Ord. 190.

⁴ *Whalley v. Pepper*, 8 Sim. 203.

Examiner or the clerk in whose custody the depositions were, had been served with an order to enlarge publication ; or unless a commission had been issued at the instance of a defendant, under the provisions of the 17th Order, for the examination of witnesses in the country, the time allowed for the return of which had not expired, in which case, publication was directed by the 17th Order, to stand enlarged until the commission was returnable.

The recent Orders of May, 1845, do not appear to have made any alteration in the practice according to which applications of this kind are hereafter to be made ; but care must be taken in future in every case, that the application to enlarge publication be made before the expiration of two months from the filing of the replication.¹ If this period has expired, it would appear, from the old practice, that the Master has no longer jurisdiction to allow any further examination of witnesses, as any subsequent application, although, in form, one to enlarge publication, is in effect one for leave to examine witnesses notwithstanding publication has passed.²

It has before been stated, that the Master has no jurisdiction to allow of the further examination of witnesses after the period has arrived at which publication, according to the general Order, passes.³

The Orders of May, 1845, have now, as we have seen, changed the manner in which publication passes, and it remains to be seen whether hereafter any terms or conditions will be annexed to the order to enlarge publication.

Hitherto in most cases publication would have been enlarged,

¹ To enlarge publication is to stay or postpone the rule for passing publication, and a motion for that purpose may be granted, on reasonable cause shown ; but this is very different from a motion to examine witnesses after publication has actually passed. *Hamersley v. Lambert*, 2 John. Ch. 432 ; post, 967, note. It is not of course to enlarge the rule to pass publication, and it will be refused where there has been great delay. *Underhill v. Van Cortlandt*, 1 John. Ch. 500.

² *Carr v. Appleyard*, 2 M. & C. 476 ; *Anon.* 5 Beav. 92 ; *Strickland v. Strickland*, 4 Beav. 146.

³ In New Jersey, the examination must close at the time limited by the rule, unless the time shall be enlarged by consent, or the Chancellor, upon petition or motion, and sufficient cause shown, shall give further time for closing the examination ; but an *ex parte* order shall not be granted after the time has expired, nor shall a second order be granted to the same party, except on two days' notice to the opposite party, and upon such terms as may be prescribed. Chancery Rule, XIII. § 2.

and a party have had an opportunity given him of examining witnesses, even though publication had been enlarged by a precedent order, if any ground for doing it was shown and verified by affidavit; ¹ as where witnesses resided in parts of the kingdom at any distance from each other, or where the party applying had not been able to examine all his witnesses under a joint commission, executed in the cause, by reason of some of the witnesses residing at a great distance from the party, and others at a great distance from the place of executing the commission; or where witnesses have refused or neglected to attend before the Commissioners; or by any accident have not been examined at the execution of the commission.² In *Barnes v. Abram*,³ publication, though often enlarged before, was enlarged again in order to enable the defendant in a title cause to search for records in the Vatican upon affidavit as to the probability of success there.

Under the practice before the Orders of 1845 came into operation, when any of the parties were desirous of obtaining a commission returnable at a period subsequent to that at which publication would have passed, the proper course seems to have been first to apply to the Master to enlarge publication, and then an order might have been obtained from the Court for the commission.⁴ The same practice appears to continue, except that now the Master has jurisdiction to hear applications for additional commissions, and to determine questions relating thereto.⁵

Where a cross bill has been filed before the original suit has been proceeded in, and the defendant to the cross suit (who is the plaintiff in the original suit) has not put in an answer to the cross bill, the plaintiff in the cross suit may have publication enlarged in the original suit till a fortnight after the answer to the cross bill shall have come in, as the discovery afforded by such answer may be of service to him in framing his interrogatories.⁶ But we have before seen, that if publication has been allowed to pass in the original suit, witnesses can no longer be examined in the cross cause concerning matters in issue in the original one.⁷

¹ Hind. 383; *Moody v. Leaming*, 1 Mad. 85.

² Hind. 383.

³ 3 Mad. 103.

⁴ *Maund v. Allies*, 4 M. & C. 503.

⁵ See ante, p. 925.

⁶ *Creswick v. Creswick*, 1 Atk. 291. See also, *Ranikissenseat v. Barker*, 1 Atk. 19.

⁷ *Pashall v. Scott*, 1 Ph. 110.

It seems, however, that after proceedings have been taken in the original cause, publication can only be enlarged where the defendant in the cross cause is in contempt, unless a special case is made. In *Cook v. Broomhead*,¹ where the cross bill was not filed till after a rule to pass publication had been entered in the original suit, and the defendant in the cross suit was not in contempt, a motion by the plaintiff in the cross suit, to enlarge publication, which was not founded upon any special grounds, was refused with costs.²

It may be mentioned here, that the Court of Exchequer has determined, that an order to enlarge publication till the coming-in of the answer in a cross-cause, shall not be granted, unless upon affidavit of the truth of the facts stated in the cross bill, and that the answer may furnish a good defence to the original bill.³ It is not necessary, however, that such affidavit should be made by the party himself, but if made by his solicitor, it will be sufficient.⁴

Sometimes, when, by accident or surprise, publication passes before a party has examined his witnesses, and there has been no blameable negligence, publication will be enlarged⁵ even after the

¹ 16 Ves. 133.

² See *Underhill v. Van Cortlandt*, 1 John. Ch. 500; *Gouverneur v. Elmendorf*, 4 John. Ch. 357; *Field v. Schieffelin*, 7 John. Ch. 250.

³ *Edwards v. Morgan*, 11 Pri. 939.

⁴ *Lowe v. Firkins*, M'Lel. 10; 13 Pri. 21, S. C.

⁵ The time for publication will be enlarged, or more properly, the time for taking testimony will be enlarged, after publication passed, though not in fact made according to the rules of the Court, provided some good cause is shown therefor upon affidavit, as surprise, accident, or other circumstances, which repel the presumption of laches. The affidavit is indispensable except in cases of fraud, practised by the other party. *Wood v. Mann*, 2 Sumner, 316. In *Hamersley v. Lambert*, 2 John. Ch. 432, it was held, that after publication witnesses cannot be examined unless under very special circumstances. See also *Hamersley v. Brown*, 2 John. Ch. 428. The deposition of a witness, whose examination was not closed until after publication had passed, was allowed to be read; he having been cross-examined by the opposite party, and no actual abuse appearing; but such practice is irregular. *Underhill v. Van Cortlandt*, 2 John. Ch. 339. The Court by extreme rigor, endeavors to guard against the abuse of introducing testimony to meet that which has been produced; and accordingly it has been held, that if, after publication has passed, the substance of the testimony taken on a material point, upon which further testimony is sought, has been disclosed to the party applying, it is too late to move to open or enlarge the rule on affidavit. *Moody v. Payne*, 3 John. Ch. 294. See this subject discussed in *Wood v. Mann*, 2 Sumner, 316.

depositions have been delivered out, upon affidavit that they have not been read. Such an order, however, cannot be made¹ except upon application to the Court itself,² nor unless some cause is shown why the witness was not examined before. And it is a rule of the Court, that the party, as well as his solicitor, must make oath that they have never seen, read, nor been informed of the contents of the depositions taken in the cause, nor will they, &c., till publication is duly passed.³

An instance is mentioned in the books, having occurred in Lord Somers's time, in which the Court granted an order to enlarge publication after it had actually passed, although the rule of the Court above stated could not be complied with; but in that case the solicitor on the other side, being an artful man, having procured copies of his client's depositions, immediately went with them to the adverse solicitor, and showed him the depositions, and read them over to him; the solicitor, being ignorant of the rule, told him he must, notwithstanding, have an opportunity of examining his witnesses, and soon after took his witnesses to the Examiner's office, where he was told they could not be examined, because publication was passed and the depositions delivered out. The solicitor, surprised at this, went to his clerk in Court to know what he was to do, and told him the whole story, which being laid before the Court, it enlarged publication, and gave the party an opportunity to examine his witnesses, and the adverse party narrowly escaped commitment for his misconduct.⁴

Where a defendant obtained an order to enlarge publication upon an allegation that it had not passed, which was untrue, the order was held to be informal, and an application, upon the usual affidavit, that publication might be again enlarged, or the evidence taken under the informal order, read at the hearing of the cause, was dismissed with costs.⁵

It seems that the Court will not only enlarge publication, upon the proper affidavits, after publication has actually passed, but it

¹ 1 Harr. (ed. Newl.) 289.

² Anon. 5 Beav. 92; *Maund v. Allies*, 4 M. & C. 503.

³ Ibid.; but see *Lawrell v. Titchborne*, 2 Cox, 289; *Hamersley v. Lambert*, 2 John. Ch. 432. In this case the Chancellor remarks, that "such an oath ought not to be much encouraged. It is partly promissory, it may be difficult to be strictly kept, and is of dangerous and suspicious tendency." p. 433.

⁴ 1 Harr. (ed. Newl.) 289.

⁵ *Conethard v. Hasted*, 3 Mad. 429.

will, if a proper case is made, even grant a second commission to examine witnesses, upon being satisfied, by affidavit, that the party applying, and his solicitor, are ignorant of the contents of the depositions.¹

The order for enlarging publication² is signed and entered by the Master, and a copy of it must then be served, not only upon the other side, but upon the Examiner who took the depositions, and the Clerk of Records and Writs in whose custody the depositions, if taken by commission, are, on or before the day on which publication actually passes.³

This is necessary, as well to authorize the giving out copies of the depositions, and to preclude further examination after the period to which publication has been enlarged, as to authorize the examination of further witnesses.⁴

It is a fixed rule of the Court, that if one of the parties, after publication has passed, obtains an order to enlarge publication, upon the usual affidavit, the other party may not only cross-examine, but may examine at large, even though he has seen and read the former depositions.⁵

Where a cause has been set down for hearing, and publication is enlarged beyond the day on which the same is set down to be heard, the proper course, if the cause is likely to come on before the depositions are ready, is to apply to the Court for an order to adjourn the hearing for a certain time. An application for this purpose must be made to the Court⁶ upon motion, of which notice has been duly served, and the order made thereon should be served, in the usual manner, upon the adverse solicitor, before the day on which the cause is to be heard, otherwise the cause, when called on, will be struck out of the paper.⁷

Publication being passed, the Examiner or Clerk of Records and Writs, in whose custody the depositions are, is at liberty to permit them to be examined, and to deliver copies of them to the parties.

¹ *Turbot v. —*, 8 Ves. 315; see also *Dingle v. Rowe*, Wightw. 99; *Cutler v. Cremer*, Mad. & Geld. 254; but see *Mineve v. Rowe*, 1 Dick. 18.

² 24th Order, 1833.

³ Hind. 381.

⁴ *Ibid.*

⁵ *Anon*, 1 Vern. 253.

⁶ 1 Smith's Ch. Pr. 388.

⁷ Hind. 385, 6.

When an office-copy of the depositions taken on behalf of an adverse party is delivered out, a copy of the interrogatories whereon such depositions were taken is always annexed.¹

SECTION VII.

Re-examination of Witnesses.

THE Court is always desirous that the examination of witnesses should be completed, as much as possible, *uno actu*, and that, whenever it can be accomplished, no opportunity should be afforded, after a witness has once signed his deposition,² and “turned his back upon the Examiner,”³ of tampering with him, and inducing him to retract or contradict or explain away what he has stated in his first examination upon a second; but, notwithstanding this unwillingness to allow a second examination of the same witness, there are cases in which, if justice requires that a second examination of the same witnesses should take place, an order will be made to permit it.⁴

Thus, where the whole depositions of the witnesses in a cause are suppressed, on account of some irregularity in the conduct of the cause, or in the examination of the witnesses, the Court will, when it is satisfied that the irregularity has been accidental and

¹ Hind. 395.

² Beames's Ord. 74.

³ Lord Abergavenny *v.* Powell, 1 Mer. 130.

⁴ The re-examination of a witness in Chancery rests in discretion, and though granted under peculiar circumstances, is against the ordinary practice of that Court. *Beach v. Fulton Bank*, 3 Wendell, 573; *Phillips v. Thompson*, 1 John. Ch. 140. A witness, examined while incompetent by reason of interest, may be re-examined after his competency is restored. *Haddix v. Haddix*, 5 Litt. 202. But a party will not be allowed to re-examine a witness whose memory has been refreshed since his examination closed, except as to documentary evidence. *Noel v. Fitzgerald*, 1 Hogan, 135. See *Byrne v. Frese*, 1 Moll. 396. Nor can a witness, after a hearing and final decree in a cause, be re-examined to explain or correct his testimony taken on his examination in chief, and read at the hearing, unless under very special circumstances. *Gray v. Murray*, 4 John. Ch. 412; *Hallock v. Smith*, 4 John. Ch. 649; *Sterry v. Arden*, 1 ib. 62; *Newman v. Kendall*, 2 A. K. Marsh. 236.

unintentional, direct the witnesses to be re-examined and cross-examined upon the original interrogatories.¹

The cases, however, in which the Court will permit the re-examination of the same witnesses after publication, are not confined to those in which the original depositions have been suppressed for irregularity; it has, as we have seen, permitted it to be done in a special case, where the depositions had been suppressed, because the interrogatories upon which they were taken were leading.²

But, even where the original depositions have not been suppressed, the Court has frequently made an order, after publication, for the re-examination of witnesses, for the purpose of proving some fact which has been omitted to be proved upon the original deposition. This is frequently done upon inquiries in the Master's office, under decrees;³ and even before the cause has been heard, the Court will entertain applications for the purpose of allowing fresh interrogatories to be administered to witnesses who have been already examined in the cause.⁴

In a case before Lord Erskine,⁵ an order was made, on the application of the witness himself, after publication, for his re-examination as to a point, upon which it appeared, by his affidavit, he had made a mistake. The order, however, was confined to permit his re-examination as to that particular point only, and it directed that the other side should have an opportunity of cross-examining him.

It is to be remarked, that the Court will not only entertain an application for this purpose, after publication has taken place in the cause, but will even at the hearing, where the defect in the evidence of a particular witness has not been discovered before,

¹ Fresh interrogatories and re-examination have been permitted after publication, where depositions have been suppressed from the interrogatories being leading, or for irregularity, or where it has been discovered that a proper release has not been given, to make a witness competent. *Wood v. Mann*, 2 Sumner, 316. See *Healey v. Jagger*, 3 Sim. 494; *Chameau*, 6 Beav. 419; *Shaw v. Lindsey*, 15 Ves. 380; *Attorney-General v. Nethercote*, 9 Sim. 311.

² See *Spence v. Allen*, Pree. in Chan. 493; 1 Eq. Ca. Ab. 232; *Lord Arundel v. Pitt*, Amb. 585; *Hind*. 398.

³ See post, "proceedings in Master's Office."

⁴ *Cox v. Allingham*, Jac. 337; *Turner v. Trelawney*, 9 Sim. 453; *Byrne v. Frese*, 1 Moll. 396; *Potts v. Turts*, *Younge*, 343; *Bridge v. Bridge*, 6 Sim. 352.

⁵ *Kirk v. Kirk*, 13 Ves. 286.

permit the cause to stand over, to enable the party to make an application to the Court for permission to re-examine the witness.¹

Sometimes, in cases of this nature, the Court, instead of having the witness re-examined, will, if the mistake involves only a verbal alteration, permit the original deposition to be amended.²

It is, however, to be observed, that, before the Court makes an order, either for the re-examination of a witness, or for amending a deposition after publication, it will examine very strictly into the circumstances of the case; and if, upon such examination, it is not satisfied that the error has been wholly accidental, or the effect of mistake or omission, either on the part of the witness or of the Examiner, it will refuse the application.³ And, in general, before making an order for the amending of the deposition, it will, unless the case is very clear, examine both the witness and the Examiner.⁴

In all the cases where a correction has been permitted in the deposition itself, a direction that the witness should reswear his depositions after the alteration, has formed part of the order.

It was stated by Lord Hardwicke, in *Bishop v. Church*,⁵ that the Court had sometimes directed a witness to attend personally when it had a doubt; but in that case the witness, having spoken so generally in his depositions as to leave a doubt in his mind upon a particular point, he refused to proceed in the cause till the witness had been examined upon interrogatories before the Master.

It is to be noticed, that an order to re-examine a witness, for the purpose of supplying a defect in his former examination, will not, in general, be made before publication has passed in the cause; the reason of which is the difficulty the Court, without seeing the depositions, would have in coming to a correct conclusion as to the propriety of granting or refusing the application.⁶

¹ *Cox v. Allingham*, Jac. 337.

² *Rowley v. Ridley*, 1 Cox, 281; 2 Dick. 687, S. C.; *Griells v. Gansell*, 2 P. Wms. 646. After publication passed and the cause set down for hearing, the deposition of a witness was allowed to be amended on examination of the witness by the Court, he being aged and very deaf, and a mistake made in taking down his testimony by the Examiner. *Denton v. Jackson*, 1 John. Ch. 526.

³ *Ingram v. Mitchell*, 5 Ves. 299.

⁴ *Ibid.* *Griells v. Gansell*, 2 P. Wms. 646; *Darling v. Staniford*, 1 Dick. 358; *Penderel v. Penderel*, Kel. 25.

⁵ 2 Ves. 100.

⁶ *Lord Abergavenny v. Powell*, 1 Mer. 131; *Batt v. Birch*, 5 Madr. 66; *Asbee*

The reader is reminded here, that where the examination of a witness is before an Examiner, either party may, up to the period of publication, exhibit new interrogatories for the further examination of the same or of other witnesses there, without an order to warrant it; but that when a commission is taken out, the practice has hitherto been different.¹ It is, however, to be here observed, that the power of exhibiting additional interrogatories for the further examination of a witness already examined before the Examiner is confined to the period of a witness being under examination. If the examination of the witness has been closed, and he has perfected and signed his deposition, (although he may be permitted to perfect his deposition in some circumstances of time or the like, or by correcting a sum upon view of any deed, book, or writing, to be shown to the Examiner,²) he cannot be again examined on behalf of the party producing him without an order of the Court; and it seems that such order cannot be obtained, unless upon affidavit that the witness, if he has been cross-examined, has not communicated the effect of his cross-examination to the party examining in chief.³ Nor will such an order be made, at least before publication, for the purpose of permitting a witness to alter or explain what he has stated upon his first examination, although he may be re-examined as to different matter.⁴

But although a witness, after he has closed his examination, cannot be re-examined, on behalf of the party producing him, without an order, he may, if he has been examined before the Examiner, be examined again by the adverse party without an order.⁵ He is, in fact, in such case, a new witness for the other party proposing to re-examine him, and may not only be examined by such party, but may be cross-examined by the party originally producing him. The same rule will also apply to examinations under a commission, where a witness who has been examined by one party may afterwards be examined by the other party, in chief, as his witness, without an order, provided such examination be upon interrogatories which have been produced before the Com-

v. Shipley, ib. 467; *Randall v. Richford*, 1 Ch. Ca. 25. But see *Kirk v. Kirk*, 13 Ves. 280; *Stanney v. Walmsley*, 1 M. & C. 361.

¹ Ante, p. 914. See also *Andrews v. Brown*, 1 Eq. Ca. Ab. 233.

² Ante, p. 920.

³ *Cockerell v. Cholmeley*, 3 Sim. 313.

⁴ *Turner v. Trelawney*, 9 Sim. 453.

⁵ *Vaughan v. Worrall*, 2 Mad. 322.

missioners were sworn. When it is necessary to examine him upon fresh interrogatories, an order to that effect must, as we have seen, be first obtained.¹ Thus, where a motion was made on the part of the defendant, that he might be at liberty to exhibit fresh interrogatories for the examination of the plaintiff's witnesses in the suit, on the ground that, after the witnesses had been examined, it was discovered that they were interested, Sir Thomas Plumer, V. C., made the order,² which was afterwards confirmed on appeal.³

It is to be observed, also, that in the above case, a new commission was necessary for the purpose of taking the examination of the witnesses to the interrogatory. But even if no new commission had been required, it would have been necessary to have obtained an order for the exhibition of the interrogatory before the Examiner; for, as we have seen before, the rule of the Court is, that if a witness has been examined by Commissioners in the country, he cannot be examined again before the Examiner, without a special order.⁴

It is to be mentioned here, that where the Court makes an order for permitting the re-examination of witnesses, it is always coupled with a direction that the other side shall have liberty to cross-examine them,⁵ and that the proceedings upon such re-examination are subject to the same rules as those upon ordinary examination. In *Bridge v. Bridge*,⁶ however, the V. C. of England, upon making an order for re-examination of a witness to part of an interrogatory, (his deposition as to which the Examiner had omitted to take down,) made it part of the order, "*that publication should pass immediately after the examination or cross-examination (if any) should be concluded, and that the cause should be adjourned, with liberty to the plaintiff to apply to have it restored to the paper when publication should have passed.*"

¹ Ante, p. 914.

² *Vaughan v. Worrall*, *ubi supra*.

³ 2 Swanst. 395; and see *Selway v. Chappell*, 12 Sim. 1052.

⁴ See *Pearson v. Rowland*, 3 Swanst. 266, n.

⁵ See order in *Cox v. Allingham*, Jac. 345; *Stanney v. Walmsley*, 1 M. & C. 361.

⁶ 6 Sim. 352.

SECTION VIII.

Examination of Witnesses after Publication.

AFTER the depositions of witnesses have been published and read by the parties, a new witness cannot be examined without an order of the Court, which will not be granted unless warranted by special circumstances,¹ except for the purpose of proving an exhibit *viva voce* at the hearing, in which case, as we have seen, an order for the examination of the witness may be obtained on motion or petition of course.²

An order for the examination of a fresh witness after publication, except it be for the purpose of discrediting a witness already examined, is not obtained without great difficulty.³ Cases, however, do frequently occur, in which the Court will allow the examination of witnesses after the depositions have been seen; and even at the hearing of the cause, leave has been given to the parties to examine witnesses to facts which have been omitted to be proved in the ordinary course. This, as we have seen, has been frequently done in the case of wills disposing of real estates,⁴ but the practice is not confined to those cases, and other cases have already been mentioned in which the Court has permitted such examinations as to different points, either by order made at the hearing, or upon petition or motion, supported by proper affidavits.⁵ In addition to which it may be stated, that an order for this purpose may be obtained, even where the same point has been examined to before.⁶

In *Newland v. Horsman*,⁷ an order was made for the examina-

¹ *Willan v. Willan*, 19 Ves. 590-592; *Hamersley v. Lambert*, 2 John. Ch. 432. It seems that new testimony may be taken after publication, to facts and conversations, occurring after the original cause is at issue, and publication has passed. The Court may, in the exercise of a sound discretion, allow the introduction of newly-discovered evidence of witnesses to facts in issue in the cause, after publication and knowledge of the former testimony and even after the hearing. But it will not exercise this discretion to let in merely corroborative testimony. *Wood v. Mann*, 2 Sumner, 316.

² Ante, p. 876. See *Wood v. Mann*, 2 Sumner, 316.

³ *Willan v. Willan*, *ubi supra*.

⁴ Ante, p. 854.

⁵ Ante, p. 855; *Clarke v. Jennings*, 1 Anst. 173; *Gage v. Hunter*, 1 Dick. 49.

⁶ *Coley v. Coley*, 2 Y. & J. 44; *Greenwood v. Parsons*, 2 Sim. 229.

⁷ 2 Cha. Ca. 74.

tion of witnesses abroad, upon new matter stated at the hearing, and not in issue before, upon terms of not delaying an action directed to be tried at Law; and in *Gage v. Hunter*,¹ leave was given, after publication, to examine a witness as to a particular fact *viva voce*, the defendant being at liberty to cross-examine.²

It is to be observed, that, in general, if leave is given to examine a witness after publication, and before hearing, a Master is sometimes ordered to settle the interrogatories, that they may be confined to such points only as were omitted before, and as are now ordered to be examined unto.³ This, however, is not always done; and when the object is merely to prove an exhibit, and the interrogatory was before filed, it is unnecessary.

Though, by the orders of the Court, the parties are to make their proof before publication and hearing of the cause, yet after hearing, if there be a reference to the Master for stating an account or such like matter, and he shall find any particular point or circumstance needful to ground his report upon, which were not fully proved, nor could be properly examined to before the Master, he may direct the parties to draw interrogatories to such points or circumstances only, and the witnesses are usually examined before the Master upon such interrogatories, if the witness be or reside within *twenty* miles of London, but, if further off, and the parties desire it, he may by certificate, direct a commission into the country.⁴

The most usual cases in which witnesses are required to be examined after publication, are those in which their testimony is required for the purpose of showing that a witness already examined is unworthy of credit.⁵ An examination for this purpose is not, however, a matter of course, it must have the sanction of

¹ 1 Dick. 49.

² See *Holles v. Carr*, 3 Swanst. 638, where a similar order appears to have been made upon consent.

³ 1 Harr. (ed. Newl.) 274.

⁴ *Ibid.*

⁵ Although the usual time for examining as to the credit of a witness, is after publication, it seems that it may be done before, provided an order for that purpose be obtained. *Mill v. Mill*. 12 Ves. 406. A witness may be examined to the mere credit of the other witnesses, whose depositions have been already taken and published in the cause, but he will not be allowed to be examined, to prove or disprove any fact, material to the merits of the case. *Wood v. Mann*, 2 Sumner, 316; *Gresley Eq. Ev.* (Am. ed.) 139-144; *Jenkins v. Eldredge*, 3 Story C. C. 312, 213; *Troup v. Sherwood*, 3 John. Ch. 558.

an order, the leading steps towards obtaining which, is the preparing or filing of objections, or "articles" in the Examiner's Office, (if the depositions impeached be taken in town,) or in the Record and Writ Clerk's Office, (where the depositions have been taken by commission.)¹

These articles may be in the following form, viz. : —

Articles exhibited by A. B., complainant in a certain cause, now depending and at issue in the High Court of Chancery, wherein the said A. B. is plaintiff, and C. D. defendant; to discredit the testimony of E. F., G. H., and J. K., three witnesses examined [before Thomas Hall Plumer, Esquire, one of the Examiners of the Court,²] on the part and behalf of the said defendant.

1st. The said A. B. doth charge and allege, that the said E. F. hath, since his examination in the said cause, owned and acknowledged that he is to receive or be paid, and also, that he doth expect, a considerable reward, gratuity, recompense, or allowance, from the said defendant, in case the said defendant recovers in the said cause, or the said cause be determined in his favor, and that the said E. F. is to gain or lose by the event of the said cause.

2d. The said A. B. doth charge and allege, that the said G. H. and J. K. are persons of bad morals, and of evil fame and character, and that they are generally reputed and esteemed so to be; and that the said G. H. and J. K. are persons who have no regard for the nature and consequences of an oath; and that they are persons whose testimony is not to be credited or believed.³

The exhibition of these articles is rendered necessary by one of Lord Clarendon's Orders,⁴ which directs, that the Examiner shall not examine any witnesses to invalidate the credit of other witnesses, but by *special* order of the Court, which is sparingly to be granted, *and upon exceptions first put into writing, and filed with the Examiner, without fee*, and notice thereof given to the adverse party or his clerk, together with a true copy of the said exceptions, at the charge of the party so examining.

¹ Hind. 374.

² If the witnesses have been examined by commission, the following words are to be substituted for those within brackets: "*by virtue of a commission, issued out of the said Court, to X. Y. and others, directed for the examination of witnesses in the said cause upon certain interrogatories exhibited before them, for that purpose, and which said witnesses were examined in the said cause.*" Hind. 375.

³ Hind. 376.

⁴ Beames's Ord. 187.

The object for which these articles are required, is to give notice to the party whose witnesses are to be objected to, of the ground of the objection, in order that he may be prepared to meet it. Without some notice of this description, it would be impossible for the other party to cross-examine the witnesses to be adduced, for the purpose of discrediting the character of his witness; for as the rule of the Court is, that you cannot examine to any points not put in issue by the pleadings, and as the character of a witness could not by that means be put in issue, it would be impossible that the party should know, that the witnesses examined by his adversary were for the purpose of discrediting his own. For this reason, the Court not only requires notice to be given of an intention to discredit a witness, in the form of articles as above stated, but it considers all examinations, as to the character of witnesses, without the previous exhibition of such articles, as impertinent, and will order them, and the interrogatories upon which they are taken, to be suppressed.¹

The articles having been filed, a certificate thereof must be procured from the Examiner, or from the Record and Writ Clerk with whom they are filed, and an application must be made to the Court, grounded upon the certificate, for leave to the party applying to examine witnesses thereon, and if necessary for a commission, to take their depositions in the country.²

It is to be observed, that although by Lord Clarendon's Order, above referred to,³ an order for leave to examine witnesses to credit, is termed a *special* order, it is usually granted as a matter of course;⁴ and may be obtained either by motion, or by petition at the Rolls, without affidavit, upon the certificate of articles being filed.⁵ It seems, however, that if made by motion, it should be upon notice;⁶ and that if the application is made after considerable delay, and the hearing of the cause will thereby be deferred, the Court will refuse the order, or qualify it, by directing that it shall not delay the hearing of the cause.⁷ There is, however, no precise time within which the application must be made.⁸

¹ *Mill v. Mill*, 12 Ves. 406.

² *Hind*. 377.

³ *Beames's Ord.* 187.

⁴ *Russell v. Atkinson*, 2 Dick. 532.

⁵ *Hind*. 377; *Watmore v. Dickson*, 2 V. & B. 267.

⁶ *Ibid.*

⁷ *White v. Fussell*, 19 Ves. 127.

⁸ *Piggott v. Croxhall*, 1 S. & S. 467.

Where a commission is required, it has generally been directed to the same Commissioners as were named in the former commission,¹ but a commission will not be directed for the purpose of examining witnesses abroad, for which purpose, Ireland is considered as a foreign part, unless in case of great emergency; and where it is sworn, that no person in England can prove anything as to the witness's credit.² If a party, who has obtained a commission to examine a witness to credit, delays the execution of it till after the decree, he will be made to pay the costs.³ The method of proceeding under an order of this nature, whether before the Examiner or under a commission, is precisely similar to that pointed out in ordinary cases.

The order usually directs, that the party applying be at liberty to examine witnesses, "*as to credit, and as to such particular facts only as are not material to what is in issue in the cause*";⁴ and under it the party is at liberty to examine witnesses, not only to the general character of the witness whose credit is impeached, but also for the purpose of contradicting particular facts sworn to by the witness, provided such facts are not material to the issue in the cause,⁵ as in *Purcell v. M'Namara*,⁶ where the matter to be examined to was, whether the witness had not been a woollen-draper and insolvent, which, upon his cross-examination, he had denied; or in *Chivers v. Bax*,⁷ where the articles charged, that though the witness, in her deposition for the plaintiff, had deposed that she lived with him as his milk-maid in 1775, she did not live with him in that or any other capacity till 1786, and that she had confessed to that effect, and that she had been prevailed upon so to depose at the instigation of the plaintiff's tithing-man, who was another witness for the plaintiff, and for a reward. In *Ambrosio*

¹ *Wood v. Hammerton*, 9 Ves. 145.

² *Callaghan v. Rochfort*, 3 Atk. 643.

³ *White v. Fussell*, 1 V. & B. 151.

⁴ *Purcell v. M'Namara*, 8 Ves. 324; *Wood v. Hammerton*, 9 Ves. 145; *Piggott v. Croxhall*, 1 S. & S. 467.

⁵ This proceeding may, ordinarily, be taken after publication and before hearing, but the interrogatories must be so shaped, as to prevent the party, under color of an examination as to credit, from procuring testimony to overcome that already taken and published in the cause. *Gass v. Stinson*, 2 Sumner, 605; *Wood v. Mann*, 2 Sumner, 316; *Troup v. Sherwood*, 3 John. Ch. 558.

⁶ *Ubi supra*.

⁷ *Scacc.*; cited 8 Ves. 324.

v. Francia,¹ the articles charged that one of the witnesses who had been examined for a defendant, to nine out of seventeen interrogatories, by the description of Mary White, widow, was the wife of the defendant, and known to be such at the time of the examination, suggested that if she was not his wife, she lived with him, and an improper intimacy subsisted between them, and the order was that the plaintiff should be at liberty to examine to that fact, and also to the competence and credit of the witness.

It seems, also, that witnesses may be examined to discredit other witnesses, by proving that previously to their examination, they had made declarations contrary to their depositions.²

But, although the order permits the examination of witnesses to particular facts as well as to general credit, for the purpose of contradicting a witness previously examined, such facts must be strictly confined to those *not in issue in the cause*; ³ and you can only, in examining as to the credit of the witness, put general questions, as "whether you would believe the witness upon his oath."⁴ It is not competent, even at Law, to ask the ground of that opinion, but only the general question is permitted.⁵ The regular mode of examining into general character, is to inquire of the witnesses whether they have the means of knowing the former witness's general character, and whether upon such knowledge they would believe him upon his oath.⁶

¹ 5th of August, 1746; cited *ib.*

² *Piggott v. Croxhall*, 4 S. & S. 477.

³ *Anon.* 3 V. & B. 94. See *Troup v. Sherwood*, 3 John. Ch. 558, and next note above; *Jenkins v. Eldredge*, 3 Story C. C. 312, 313; *Wood v. Mann*, 2 Sumner, 316.

⁴ *Anon.* 3 V. & B. 94. Upon such examination, the rule of evidence, as to impeaching the credit of witnesses, is the same in Equity as at Law. The inquiry must be general as to the general character of the witness for veracity. *Troup v. Sherwood*, 3 John. Ch. 558. The practice in reference to the extent of inquiry that may be made respecting the character of the witness to impeach his credit, and the questions that may be put, is not uniform in the American States. See 1 Greenl. Ev. § 461; *Anon.* 1 Hill, S. Car. 251, 258, 259; *Hume v. Scott*, 3 A. K. Marsh. 261, 262; *State v. Boswell*, 2 Dev. Law R. 209, 210; *People v. Mathew*, 4 Wendell, 257, 258; *Phillips v. Kingfield*, 19 Maine, 375; *Gass v. Stinson*, 2 Sumner, 610; *Wike v. Lightner*, 11 Serg. & Rawle, 198; 1 Phil. Ev. (Cowen & Hill's ed. 1839,) 291–293, notes (530) (531); 2 *Ib.* (Cowen & Hill's notes.) p. 763 to 770.

⁵ *Carlos v. Brook*, 10 Ves. 49, 50.

⁶ Phil. & Amos, 925. The regular mode of examining into the general reputation is to inquire of the witness, whether he knows the general reputation of

It is to be noticed, that although articles may be exhibited as to the *credit* of witnesses after publication, they are never allowed as to their *competency*, because it is said this might have been examined to and inquired into upon the examination ;¹ and it is for this purpose that a notice of the witness's name and place of abode is left with the solicitor of the opposite party before examination ; and that, under the old practice, the witness himself was produced.²

Interrogatories adapted to the inquiry intended, must be drawn and filed in the same manner as upon examination in chief, and the witnesses examined thereon, either by commission or at the Examiner's Office. The other party may cross-examine those witnesses, as to their means of knowledge and the grounds of their opinion, or may attack their general character, and, by fresh evidence, support the character of his own witness.³

The rules as to passing publication, &c., are the same, *mutatis mutandis*, as those to be observed in ordinary cases.

Where an objection is established to the *competency* of a witness, his deposition cannot be read ;⁴ but, where the objection is only to his credit, it must be read and left to the consideration of the Court on the whole evidence of the case.⁵

the person in question, among his neighbors ; and what that reputation is, whether it is good or whether it is bad. In the English Courts the course is further to inquire, whether from such knowledge, the witness would believe that person upon his oath. In the American Courts the same course has been pursued ; but its propriety has been questioned, and perhaps the weight of authority is now against permitting the witness to testify to his own opinion. 1 Greenl. Ev. § 461 ; Gass v. Stinson, 2 Sumner, 610 ; Kimmel v. Kimmel, 3 Serg. & Rawle, 337, 338 ; Phillips v. Kingfield, 19 Maine, 375 ; 2 Phil. Ev. (Cowen & Hill's notes,) (530,) (531,) pp. 763 - 770.

¹ Callaghan v. Rochfort, 3 Atk. 643.

² Hind. 375.

³ Ibid. ; also, Hind. 377. If the witness be impeached, evidence of his general good character is admissible. Richmond v. Richmond, 10 Yerger, 343 ; 1 Greenl. Ev. § 461. See The People v. Davis, 21 Wendell, 309.

⁴ The deposition of a disinterested person who afterwards becomes interested, may be read. Hitchcock v. Skinner, 1 Hoff. Ch. R. 21.

⁵ Dixon v. Parker, 2 Ves. 219, 220.

CHAPTER XXII.

OF SETTING DOWN THE CAUSE FOR HEARING.

WHEN the evidence is closed, the next step is to set the cause down for hearing.¹

Formerly, this might be done before either the Lord Chancellor or the Master of the Rolls, according to the discretion of the solicitor, regulated by the nature and importance of the suit, and the arrear of cases depending before each of them respectively; but we have seen that, according to the present practice, it is incumbent upon the plaintiff, at the time when he files his bill, to signify by indorsement upon the record before which of the Judges of the Court he intends the cause to be heard.²

After a cause is set down before the particular Judge, with whose name it is indorsed, it remains liable to be transferred to the Court of any other Judge, by special order of the Lord Chancellor.

A cause is usually set down for hearing by the plaintiff; and the 16th Order of May, 1845, Art. 45, provides, that "within four weeks after publication has passed, the plaintiff is to set down his cause, and obtain and serve a subpoena to hear judgment; otherwise any defendant may move to dismiss the bill for want of prosecution."³ This Order is still applicable, though for the word publication it would be now more correct to say closing of evidence.

¹ The English rules in Chancery, relating to setting down a cause for hearing, have not been adopted in Massachusetts. *Charles River Bridge v. Warren Bridge*, 7 Pick. 344. See *Pingree v. Coffin*, 12 Cushing, 600. They are inapplicable in New Jersey. *West v. Paige*, 1 Stockt. (N. J.) 203. In this latter State by rule of Court, all causes, including pleas and demurrers, shall be set down for hearing for the first day of the term, if there is sufficient time to give the required notice; if not time, then at a subsequent day in the term, and shall have priority according to the date of the issue. Chancery Rule, XV.

² In Massachusetts, cases in Equity, and motions and other applications therein, whether interlocutory or final, shall in the first instance be heard and determined by one of the Justices of the Supreme Judicial Court. Genl. Sts. c. 113, § 6. And for hearings, and making, entering, and modifying orders and decrees in Equity causes, by a single Justice, and issuing writs in such causes, the Court shall be always open in each county, except on holidays established by law. Genl. Sts. c. 113, § 6.

³ See also 114th Order, Art. 4.

The Orders of May, 1845, allow, as we have seen, four weeks after the closing of the evidence for the plaintiff to set down his cause, but they do not define how soon after publication he is at liberty so to do.

The 82d Order of 1828 directs that from thenceforth "causes may be set down for hearing, and the *subpœna ad audiendum judicium* served and returnable on any day as well out of term as in term," and there appears to be no reason now why a plaintiff should not set his cause down immediately after the evidence is closed.

It has been stated,¹ "that if, after publication passed, the plaintiff neglects to set the cause down to be heard, any defendant, after the expiration of four weeks, may set the same down at his own request, instead of proceeding to dismiss the bill for want of prosecution, and may obtain a subpœna to hear judgment, and serve the same on the plaintiff."

According to the former practice, a defendant could not regularly set down a cause to be heard before publication; so that if the plaintiff obtained an order to enlarge publication, unless the order was upon some condition that it should not prevent the cause from being set down in the mean time, the defendant could neither set down the cause nor serve a subpœna to hear judgment, until after the time to which publication was enlarged had expired.² When the defendant applied to enlarge publication, it was usual to make the order with a special clause, "so as not to prevent the plaintiff setting down his cause in the mean time."³ This order applied to the old practice, but there is nothing to prevent the Court acting upon the precedent hereafter.

When the plaintiff, instead of filing a replication, proceeds to have the cause heard upon bill and answer,⁴ he must, under the 114th Order of May, 1845,⁵ set the cause down within four weeks after the answer, or the last of the answers, is found or deemed to be sufficient, or after the filing of a traversing note.

¹ Ante, p. 800.

² Langley v. Fisher, 5 Beav. 588; Ellis v. King, 4 Mad. 126; 116th Order, May, 1845.

³ Hind. 403.

⁴ Where an answer, if true, is an insufficient defence, the proper course is to set the cause down for hearing on the bill and answer which is tantamount to a demurrer at law. Bridge v. Burns, 1 Morris, 287.

⁵ See ante, p. 800.

And under the 115th of the same Orders, if he has after answer amended his bill without requiring an answer to the amendments, and does not intend to file a replication, he must set the cause down to be heard, on bill and answer, within the periods mentioned in the Order under different circumstances.¹

It will be recollected that the term last answer means here the last answer of all the defendants.²

Previous to a cause being set down to be heard, it is necessary for the party setting it down to obtain a certificate from the Clerk of Records and Writs that the cause is in a fit state for hearing.

It is not now necessary that there should be any fiat, order or direction from the Lord Chancellor for the purpose of setting down a cause, but the same is set down by the Registrar upon the production of the certificate.³

By the 39th Order of 1828, it is directed, "That when any cause shall become abated, or shall be compromised, after the same is set down to be heard in either of the said two Courts, the solicitor for the plaintiff shall also certify the fact, as the case may be, to the Registrar of the Court where the cause is so set down, who shall, in like manner, cause an entry thereof to be made in his cause-book; and the solicitor for the plaintiff shall be allowed the same fee of six shillings and eightpence for such certificate, if he shall certify the fact as soon as the same shall come to his knowledge."⁴

The 116th Order of May, 1845, provides that the defendant may, after the expiration of four weeks from the closing of the evidence, set the cause down at his own request. The defendant will have to pursue the same course as the plaintiff of obtaining a certificate from the Clerk of Records and Writs, and the cause will be set down, designated as set down at the request of the defendant. The defendant must then serve the plaintiff with the subpoena to hear judgment.⁵

Certain causes, generally called short causes, have a privilege of being heard before their turn. To obtain this privilege, there must be a certificate from the counsel of one of the parties, that the cause is fit to be heard as a short cause.

¹ See ante, p. 800.

² *Preston v. Collett*, 3 Mac. & Gor. 432.

³ 23d Order, February, 1850; and see Regulations of 1st March, 1850, as to the certificate.

⁴ *Saner v. Dewin*, 14 Beav. 646.

⁵ *Smith v. Wells*, 6 Mad. 123.

Upon the production of this certificate to the Registrar the cause will be marked short. The consequence of which is, that the cause will be heard on the next short cause day. Notice that the cause has been so marked must be given to the other solicitors in the cause, by the solicitor who has caused it to be so marked.

The party thus advancing a cause proceeds at his peril, and if upon the hearing coming on before the Court it shall appear that the cause is not one which is entitled to be so advanced, the costs occasioned by the advancement will have to be paid by the party who has been the cause of it.

CHAPTER XXIII.

OF THE SUBPŒNA TO HEAR JUDGMENT.

WHEN the cause has been set down, the next step is to give notice to the adverse party of the day appointed for hearing. This is done by means of a writ called a *subpœna to hear judgment*.

The Orders of May, 1845, have rendered it incumbent upon the plaintiff to obtain and serve a subpœna to hear judgment, as well as to set his cause down for hearing, within the period of four weeks from the time of publication, otherwise the defendant may move to dismiss the bill for want of prosecution.¹ The practice is for this subpœna to issue at the time the cause is set down; and if the plaintiff sets his cause down without then suing out the writ, he will not be able to obtain it subsequently without a special application to the Court to adjourn the cause, so that the subpœna may issue and bear date at the time when the cause is entered for hearing.²

It is sometimes the practice amongst solicitors, instead of serving subpœnas to hear judgment, to take each other's undertaking to appear at the hearing. This, however, is an unsafe practice; and in cases where it is important to the party that the suit should be disposed of, ought not to be resorted to; because, if the party giving the undertaking fails to appear at the hearing, the party

¹ 114th Order, Art. 4, p. 767.

² *Harvey v. Towell*, 4 H. 166.

setting down the cause can do nothing, and the cause must be struck out of the paper: whereas, if, after subpœna to hear judgment duly served, default is made by the party served, the other party, if plaintiff, will, upon producing to the Court an affidavit of the service of the subpœna, be permitted to take a decree against the defendant making default.¹ And so where a cause has been set down at the request of a defendant, if the plaintiff, having been served with a subpœna to hear judgment, omits to appear when the cause is called on, the defendant will be in a situation to have the bill dismissed with costs, upon producing an affidavit of service of the subpœna.²

The subpœna to hear judgment is prepared by the solicitor requiring it, who, previously to suing it out, must procure from the Registrar a note, in writing, of the day appointed for the return of the subpœna.³ This note is called a "*subpœna note*," and is filed in the Subpœna Office; by an order of the Court,⁴ "the Registrar or any of his clerks are not to make any such note before they have a certificate that the cause is ready for hearing."

The form of the writ, according to the Orders of May, 1845, is as follows:—

"*Victoria, &c.*

"*To —, greeting.*

"*We command you, [and every of you,] that you appear before our Lord High Chancellor [or before his Lordship or Honor the Master of the Rolls, as the cause may be set down] on the — day of — next, or whenever thereafter a certain cause now depending in our High Court of Chancery, wherein A. B. [and others, or another, are or] is plaintiff, [or plaintiffs,] and C. D. [and others, or another, are or] is defendant [or defendants], shall come on for hearing, then and there to receive and abide by such judgment and decree as shall then or thereafter be made and pronounced, upon pain of judgment being pronounced against you by default.*

"*Witness, &c.*

DEVON."

The 16th Order of May, 1845, Art. 46, directs, that "A sub-

¹ See post, p. 758.

² *Ellis v. King*, 5 Mad. 21. See also *Cook v. Bromhead*, 16 Ves. 134.

³ Form of subpœna note:—A. v. B., to be heard the — day of —.

⁴ Beames's Ord. 46.

pœna to hear judgment is not to be returnable at any time less than one month from the *teste* of the writ ; and it is to be served at least ten days before the return thereof.”¹

Formerly a subpœna to hear judgment could only be made returnable in term time, but by the 82d Order of 1828, it may be made returnable as well out of term as in term.

Upon the back of the writ, the name or firm and the place of business or residence of the solicitor or solicitors issuing the subpœna must be indorsed ; and where such solicitors shall be agents only, there must be further indorsed thereon the name or firm and place of business or residence of the principal solicitor or solicitors.² And it is to be observed, that an affidavit of service of such a subpœna must state the indorsement.³

By the 5th Order of 1833, it is provided, that this subpœna, as well as all others, except a *subpœna duces tecum*, shall contain three names where necessary or required. In reckoning which the names of husband and wife are counted as one.⁴

Personal service of the subpœna to hear judgment was dispensed with by the 20th Order of 1828, and by the 26th Order of May, 1845, “Service upon a defendant’s solicitor of a subpœna to answer an amended bill, or to hear judgment, is to be deemed good service upon a party.”

No subpœna (except for costs) can be served after twelve weeks from the date of the writ ;⁵ and the 25th Order of May, 1845, directs, that “In the interval between the suing out and service of any subpœna the party suing out the same may correct any error in the names of parties or witnesses, and may have the writ resealed upon payment to the clerk of the Subpœna Office of a fee of one shilling, and at the same time leaving a corrected præcipe of such subpœna marked, altered or resealed, and signed with the name and address of the solicitor or solicitors suing out the same.”

If, however, an irregularity occurs either in the writ or in the service of it, the appearance of the parties in pursuance of it will

¹ The subpœna note usually appoints the day for the return of the subpœna to hear judgment one calendar month from the time of issuing it, so as to enable the party to sue and serve the subpœna before the lunar month begins to run.

² 3d Order, 1833.

³ *Powell v. Martin*, 1 Jac. & W. 292 ; *Rigg v. Wall*, 3 M. & C. 506.

⁴ Beames’s Ord. 7.

⁵ 16th Order, Art. 1.

waive it; and where a defendant, after service of a subpœna to hear judgment, in which the plaintiff's name was misspelt, appeared upon a motion to advance the cause, and opposed it, but did not appear at the hearing, whereupon a decree was made by default, it was held that the defendant had waived the objection by appearing upon the motion, and not then objecting.¹

Where a cause has been set down by a defendant, he is not obliged to serve any other party with a subpœna to hear judgment than the plaintiff, and if there are other defendants, it is the duty of the plaintiff, and not of the defendant setting down the cause, to serve them.²

When a cause has been once set down, and a subpœna to hear judgment served, a revivor of the suit, after abatement by the death of the plaintiff, will not render the service of a new subpœna to hear judgment necessary.³

Whenever a plaintiff undertakes to set down his cause for hearing, it is held, that his undertaking extends to serving a subpœna to hear judgment.⁴

Where, however, a plaintiff, who had replied to the answer, was permitted to withdraw his replication, upon his undertaking to set the cause down for hearing upon bill and answer, it was decided, that the service of the order was equivalent to serving a subpœna to hear judgment, and upon the plaintiff's not appearing when the cause was called on, the bill was dismissed with costs.⁵

Each party, as well the one served as the party serving the subpœna, will do well, before the day of hearing, to have an affidavit of the service of the writ filed at the proper office, and to be provided with an office copy of it, to be made use of in case the opposite party do not appear when the cause is called on. Such affidavit, when filed on behalf of the plaintiff, should be made by the party serving it, and it must distinctly describe the manner of service, and must contain a copy of the writ, as well as of the *indorsement upon the writ* as of the body of it; otherwise a decree taken upon the production of such affidavit will be irregular.⁶

¹ Carrick v. Young, Jac. 524.

² Smith v. Wells, 6 Mad. 193.

³ Bray v. Woodran, Mad. & Geld. 72; and see Byne v. Potter, 5 Ves. 305; Knowles v. Spence, Mos. 225.

⁴ Dixon v. Shum, 18 Ves. 520.

⁵ Rogers v. Goore, 17 Ves. 130.

⁶ Powell v. Martin, 1 Jac. & W. 292; Bigg v. Wall, 3 M. & C. 506.

The same rule also applies to affidavits required to be produced by a defendant verifying the service of the subpoena to hear judgment, for the purpose of obtaining a dismissal of the bill upon the plaintiff's making default at the hearing.

Whenever no appearance is made for a party at the hearing, it is advisable to get the affidavit entered by the Registrar, as in case of the solicitor for such party neglecting to attend and produce his brief on drawing up the decree, it may be taken on the affidavit of service.

CHAPTER XXIV.

OF HEARING CAUSES.

THE Registrars keep distinct lists of the causes and other matters to be heard before each Judge,¹ and from these lists the paper of causes to be heard on each day of hearing is made out.

¹ In Massachusetts, cases in Equity, and motions and other applications therein, whether interlocutory or final, shall in the first instance be heard and determined by one Justice of the Supreme Judicial Court. Genl. Sts. c. 113, § 6. All hearings shall be had in the county in which the cause is pending, if the Court is in session therein; and cases set down for hearing shall be heard in their order upon the docket in the county in which they are pending, if not heard before the Court shall sit in such county, unless the Court shall otherwise order. Rule 35 of the Rules for Practice in Chancery. A single Justice, or the full Court, sitting in one county, may, when needful, hear and determine cases pending in another county, and any motion therein. And all orders and decrees made on such hearings shall be transmitted to the clerk in the proper county, to be by him entered. Genl. Sts. c. 113, § 18. Sec. 19 provides for reasonable notice in such cases to the adverse party or his counsel. When any party shall desire a hearing in Equity before a single Justice, except at a term of the Court held in the county where the cause is pending, he shall apply to the Justice to appoint a time and place for the parties to attend; and when such time and place are appointed, he shall give notice thereof to the adverse party, or his solicitor or counsel, within three days, if the cause is pending in the county of Suffolk, and within seven days, if the cause is pending in any other county. All such notices may be transmitted through the post-office, post-paid; and shall be deemed to have been received by the person to whom they are addressed, in due course of mail, unless the contrary shall appear by affidavit. Rules 36 and 20, of the Rules for Practice in Chancery. Cases may be heard by consent of parties, and the permission of the Court, without such notice. Rule 36. Where a case pending in one county or any motion therein is heard before a

The daily paper of causes for hearing is always made out by the Registrars from the list of causes entered in their general books of causes, taken in rotation as they stand ;¹ and a copy of this paper is put up in the Registrar's Office on the evening of the day previous to the hearing.

We have before seen the manner in which short causes are advanced and heard before their regular time.

It must also be recollected that the cause list is in the discretion of the Judge of the Court, who, upon sufficient reason, will advance a cause, or let it be taken out of its turn.²

Where an order has been obtained for taking the bill *pro confesso*, the Court will usually appoint a special day for the hearing.³ Formerly, the Court would not advance suits for the foreclosure of mortgages ;⁴ but now, by the 4th Order of May, 1839, "Foreclosure causes, when ready for hearing, may be ordered to be advanced for hearing, under the same circumstances and subject to the same rules as other causes may be ordered to be so advanced."⁵

Formerly, a distinction was made between what were called consent causes and short causes. This distinction, for practical purposes, seems now to be abolished. Of course causes in which all parties consent to the decree are short causes, but such cases do not usually occur, as they involve those who conduct them in somewhat unnecessary responsibility.

It may be mentioned, with reference to the subject of consent causes, that a decree or order made by consent of the counsel for the parties, cannot be set aside either by rehearing or appeal,⁶

single Justice or the full Court sitting in another county, either party may transmit to the Court his reasons in writing for or against the application, and the Justice shall examine the same and proceed thereon as if the parties were present. Genl. Sts. c. 113, § 20. The Justices of the Court shall, from time to time, by arrangement among themselves, designate some one of their number to attend at some convenient place in Boston, at all convenient times, for the purpose of hearing matters in Equity, who by his rescript may make decrees and orders in Equity suits in any county. Genl. Sts. c. 113, § 24.

¹ Hoyle v. Livesey, 1 Mer. 381.

² Ransom v. Samuel, Cr. & Ph. 181.

³ 81st Order, May, 1845 ; ante, p. 367.

⁴ Rashleigh v. Dayman, 2 Mad. 147.

⁵ Carthew v. Barclay, 10 Sim. 273 ; Browne v. Lockhart, *ibid.* 420.

⁶ Brandish v. Gee, Amb. 229 ; Harrison v. Rumsey, 2 Ves. 488 ; Belt's Sup. 391 ; Toder v. Sampson, 7 Bro. P. C. 244. The same principle applies to orders made on *ex parte* applications. Sturgeon v. Hooker, 2 Phil. 289. An order or decree in Chan-

or by bill of review,¹ unless by clerical error anything has been inserted in the order, as by consent, to which the party had not consented, in which case a bill of review might lie;² if, however, the decree has been obtained by fraud, relief may be had against it by original bill.³ The consent of counsel to a decree is to be given upon their own conception of their instructions,⁴ and as the client is bound by the act of his counsel, he must, if the counsel has consented without sufficient authority, seek his remedy against the counsel.⁵ It has been before stated,⁶ that although, where in-

cery, entered by consent, is not the subject of an appeal or rehearing. *Atkinson v. Manks*, 1 Cowen, 693; *Armstrong v. Cooper*, 11 Ill. 540. But see *Brewer v. State of Connecticut*, 9 Ohio, 189, decided under the Act of Ohio, 1831, giving an appeal "from any final sentence or decree"; and see also *Morris v. Davies*, 5 Clark & Fin. 163. If an order or decree appealed from, purports on its face to have been taken by consent of the party appealing, it will be deemed by the Court above, on appeal, to have been so taken; and they will not hear evidence on the question whether it was so taken. If it was in fact not taken by consent, the party should have applied to the Court below to have the mistake in the entry corrected. *Atkinson v. Manks*, 1 Cowen, 693. A decree by consent is binding and conclusive unless procured by a fraud. *French v. Shotwell*, 5 John. Ch. 564. One affected by a decree, though not a party, may aver and prove that it was entered by an agreement of the parties, though it contradicts the record. *Stark v. Thompson*, 3 Monroe, 302. See *Shute v. Gustin*. Halst. Dig. 175; *Lewis v. Lewis*, 1 Alabama, 35.

¹ *Webb v. Webb*, 3 Swanst. 658, and see *Smith v. Turner*, 1 Vern. 274, ed. Raitby; *Armstrong v. Cooper*, 11 Ill. 540.

² *Anon.* 1 Ves. jr. 93.

³ *Brandish v. Gee*, Amb. 229. Or by setting the decree aside, if the fraud is discovered at the same term the decree is made. *Doss v. Tyack*, 14 Howard, (U. S.) 297.

⁴ *Mole v. Smith*, 1 J. & W. 673.

⁵ *Brandish v. Gee*, *supra*; *Turner v. Turner*, 1 De G. Mac. & Gor. 28; 1 Hoff. Ch. Pr. 27 and note; *Corning v. Cooper*, 7 Paige, 587. Where upon the hearing of a cause the counsel of the defendants abandoned the defence after hearing the opening argument in behalf of the plaintiffs, the Court refused to grant a rehearing upon the ordinary certificate of counsel. To obtain a rehearing under such circumstances, the defendants will be obliged to show a violation of duty on the part of their counsel, or that he had clearly mistaken either the law or the facts. *Decarters v. La Farge*, 1 Paige, 574. The Court has power, even after enrolment, to open a regular decree, obtained by default, to discharge the enrolment, for the purpose of giving the defendant an opportunity to make a defence on the merits, where he has been deprived of such defence, either by mistake or accident, or by the negligence of his solicitor. *Millsbaugh v. McBride*, 7 Paige, 509.

⁶ *Ante*, p. 165.

infants are concerned, the Court does not usually make a decree by consent, without first inquiring whether it will be for their benefit, yet, if such a decree is made, the infants will be bound by it.

Sometimes a cause will be advanced to the head of the paper, *pro formâ*, to enable a witness attending from a public office in the country, to prove a document and return: this is frequently done in cases where it is necessary to produce an original will from the Registry of the Prerogative Court of York, or from any inferior ecclesiastical jurisdiction; which is always necessary where a will of real estate is to be established by the decree of the Court. In one case an application was made to the Court, that a cause, which was not in the paper for the day, might be immediately called on for the purpose of proving a will, the proper officer having come up from York with the original for that purpose, and being detained in town at a considerable expense, the application was granted, and the cause having been called on, the will was produced by the proper officer to the Registrar.¹

So, also, under the recent practice, by which the Court can examine a witness *vivâ voce*, a cause has been advanced for this purpose.

Where original and cross causes are set down, the one preceding the other, and some other causes intervene, the plaintiff in the original cause, if the cross cause has acquired priority in the paper of causes, or *vice versâ*, may (if necessary) move for leave to bring forward his cause, so that both original and cross cause may come on for hearing at the same time, or that the cross cause or original cause, as the case may be, may stand adjourned, in order that both causes may be heard together.²

Upon an application of this sort, it may be necessary to engraft a request that the depositions (if any) taken in the original cause may be read at the hearing of the cross cause, *et sic e converso*; ³ it is to be noticed that such an order, when obtained, may be made use of by the other side, without notice, unless he is, upon special reason shown to the Court by the party first obtaining the same, inhibited by the same order from so doing; ⁴ but it is necessary that a subpœna to hear judgment should be served in each cause; for the cause of that party who omits serving this process

¹ Anon. 4 Mad. 271.

² Hind. 415.

³ Ibid.

⁴ Beames's Ord. 194.

shall not come on at the same time with the other party's, unless the latter consents to it.¹

The same application may also be made by the plaintiff, where there are original and supplemental causes entered for hearing in the same paper, with other causes intervening.

If the party who procures a cause to be set down for hearing is not ready to hear it at the day, he must ask the Court to allow it to stand over to another day ; such an application, however, will not be granted, unless upon the terms that the party making it shall pay to the other the costs of the day.² By the 35th of the Orders of 1828,³ it is directed, " That where a cause being in the paper for hearing is ordered to be adjourned upon payment of the costs of the day, there the party to pay the same, whether before the Lord Chancellor, the Master of the Rolls, or the Vice-Chancellor, shall pay the sum of 10*l.*, unless the Court shall make order to the contrary."

It is to be observed, that where there are more defendants than one, the sum of 10*l.* is not payable by the plaintiff to each of the defendants, but is divisible amongst them all,⁴ and that the party setting down the cause may obviate the necessity of paying it at all, by applying to have the cause adjourned before it comes into the daily paper.

The most usual reasons for applying to adjourn a cause, are the discovery of some defect in the pleadings which may render an amendment of the bill, or the filing of a supplemental bill necessary,—the circumstances that the cause is likely to come on for hearing before the evidence is closed (which may happen in cases where the defendant has obtained an order to enlarge the period for taking evidence, on condition that it is not to delay the plaintiff in setting down his cause),—or the fact that the suit is under compromise : in such cases, an application should be made to the Court, by motion or petition, for an order to adjourn the cause before it appears in the daily paper of causes ; otherwise the Court, instead of adjourning the cause, will order it to be struck out of the general paper, and thereby impose upon the plaintiff the necessity of again setting it down ; in which case he will be within the

¹ 1 Harr. (ed. Newl.) 311.

² Hind. 416.

³ 35th Order, 1828.

⁴ Ch. Rep. Expl. Paper, Prop. 58, p. 85.

operation of the 34th Order of 1828, which directs that "where a cause, which stands for hearing, is called on to be heard, but cannot be decided by reason of a want of parties, or other defect on the part of the plaintiff, and is, therefore, struck out of the paper, if the same is again set down, the defendant or defendants shall be allowed the taxed costs occasioned by the first setting down, although he or they do not obtain the costs of the suit."

It is to be observed, that a cause will not be adjourned because a cross bill has been filed, to which no answer has been put in.¹

The plaintiff's solicitor should take care, before a cause is called on, to furnish the Judge who is to hear it with a print of the bill or a copy of the title of the cause, and of the prayer of the bill;² he should also, as well as the solicitor for the defendants, be in attendance, either by himself or his clerk, when the cause is called on, and during the hearing. In order to enforce the performance of this duty on the part of the solicitors, the 36th of the Orders of 1828 directs, that "Whenever upon the hearing of any cause or other matter, it shall appear that the same cannot conveniently proceed, by reason of the solicitor for any party having neglected to attend personally, or by some proper person on his behalf, or having omitted to deliver any paper necessary for the use of the Court, and which, according to its practice, ought to have been delivered, such solicitor shall personally pay, to all or any of the parties, such costs as the Court shall think fit to award."³

The causes in the paper for the day are generally called on by the Registrar in the order in which they there stand.⁴ If

¹ *Coates v. Pearson*, 4 Mad. 262.

² In New Hampshire, "If the cause is to be heard upon bill and answer, notice shall be given thereof, with a copy of the bill and answer, if not before furnished to the Court or one of the Justices, without delay, or the bill may be dismissed. Rule 25. If the cause is to be heard on the bill and demurrer, copies thereof, if not already furnished, shall be given to the Court or one of the Justices without delay, or the bill may be dismissed. Rule 26. Within ten days after the evidence is by the rules required to be closed, each party shall furnish the evidence taken by him to one of the Justices of the Court, otherwise such evidence may be regarded as waived, or the party in fault may be charged with the costs occasioned by the delay. Rule 27 of Chancery Practice, 38 N. Hamp. 610.

³ In Massachusetts, the original papers in any suit in equity, may be taken from the files in any county by the counsel of record of either party, for use before the Court, upon leaving a memorandum and receipt on such files, containing a short description of the papers so taken. Genl. Sts. c. 113, § 25.

⁴ It seems that if a peer of the realm is interested in a cause and comes upon the

upon a particular cause being called and the bill opened, the defendant does not appear to open his answer, the Court calls on the plaintiff to prove service upon him of the subpœna to hear judgment.¹

The 44th Order of August, 1841, directs, "That where a defendant makes default at the hearing of a cause, the decree shall be absolute in the first instance, without giving the defendant a day to show cause, and such decree shall have the same force and effect as if the same had been a decree *nisi* in the first instance, and afterwards made absolute in default of cause shown by the defendant." ²

In the case of a decree made after an order to take the bill *pro confesso*, we have seen that the Court does not now allow the plaintiff to take such a decree as he can abide by, but itself makes the decree which seems just.³ The Orders of 1841 have not provided that the decree made upon the default of the defendant to appear at the hearing shall be the act of the Court itself, but probably such a practice will be adopted; otherwise it does not seem clear what restraint there would be upon a plaintiff in drawing up his own decree.⁴ This appears to be the practice in Ireland.⁵ Even before the 44th Order of August, 1844, when the object of the bill was to establish a will against an heir-at-law, the Court, notwithstanding he made default, ordered the proofs of it to be read, for the will could not otherwise be declared to be well proved.⁶

The same course of proceeding, *mutatis mutandis*, as that adopted where the plaintiff has set the cause down and does not appear, may be taken where the cause has been set down at the request of the defendant and the plaintiff does not appear; in such cases the

bench, it is usual, after the cause then in hearing is over, to call on his cause before the others which are above it; if, however, the peer's cause stands low down in the paper, and the adverse counsel say they are not ready, but will be so when the cause is called on in its course, the Court will not force them to go on, and the nobleman must wait till his cause is called and comes on in its course. For. Rom. 154.

¹ *Carew v. Johnstone*, 2 Sch. & Lef. 300; and *Knight v. Young*, 2 V. & B. 186.

² See Rule 14 of the Chancery Rules of New Jersey.

³ Ante, p. 505.

⁴ *Browne v. Smith*, 5 Jur. 1195.

⁵ *Hayes v. Brierley*, 3 Dr. & W. 274.

⁶ *Webb v. Litcot*, 3 Atk. 25.

decree pronounced by the Court will be for a dismissal of the plaintiff's bill against the defendants, with costs, absolutely,¹ but the defendant can take no advantage of the plaintiff's non-appearance, except the subpoena to hear judgment appears to have been properly served, for otherwise the plaintiff is in no fault.²

Where the cause has been set down by the plaintiff, and the defendant's counsel is ready and appears, and no counsel appears for the plaintiff, the Court always calls upon the defendant to prove service, upon himself, of the subpoena to hear judgment; this must be done by affidavit in the manner above pointed out; and if the Court is satisfied that the subpoena to hear judgment has been served, it will make a peremptory decree to dismiss the plaintiff's bill with costs.³ It is to be observed, that if a plaintiff sets down his cause but does not serve the defendant with a subpoena to hear judgment, the defendant cannot have a decree to dismiss, but should, if he wishes to have the suit decided, set the cause down to be heard at the request of the defendant.

It sometimes happens, that a person who has not been served with a subpoena to hear judgment, or who has not appeared in the cause, is willing to be bound by the decree; in such a case the rule seems to be, that any party named as a defendant to a bill may with the consent of the plaintiff alone appear at the hearing of the cause, and be bound by the decree, although such party has not been served with a subpoena to appear, or has not appeared in the suit; but a person, who has not been named as a defendant to the bill, cannot appear at the hearing, without the consent of all parties to the cause.⁴

The formal method of hearing a cause, where all the parties appear upon its being called on, is this:⁵—The plaintiff's bill is first opened, or the substance of it briefly stated, and the defendant's answer also, by the junior counsel on each side: after which, the plaintiff's leading counsel states the case, and the matters in issue, and the points of equity arising therefrom; and then such depositions and parts of the defendant's answer, as are intended to

¹ Hind. 407, 418. *Clark v. Wilson*, 24 May, 1775.

² *Ibid.*

³ Hind. 419, and 117th Order, May, 1845, ante, p. 799.

⁴ *Dyson v. Morris*, 1 Hare, 413. See the remarks on this case in the note to *Lewis v. Clowes*, 10 Hare, App. 62.

⁵ For the course of proceeding on the hearing of a case in Equity, in Maine, See Rule 18 Chancery Practice, 37 Maine, 588, 589.

be used on the part of the plaintiff, are read by the junior counsel. It is, however, now usual for the Court to dispense with the opening of the bill and answer by the junior counsel, so that the hearing is commenced by the leading counsel stating the case of the plaintiff.¹

Pleadings in the cause and depositions are usually read from office copies, which, for this purpose, must be duly signed by the proper officer.² But neither drafts nor office copies of pleadings are considered, by the Court, as evidence in themselves, and if a doubt is suggested as to their accuracy, the Court will refer to the original record; indeed, the practice of referring either to drafts or to office copies, appears to have been adopted merely to save the Court the trouble of inspecting the original record, which is, nevertheless, always understood to be in Court.

With reference to the question of stamps upon written documents, read at the hearing of a cause, it may be useful in this place to state, that the Court of Chancery will not receive in evidence any document, which ought to be stamped, without it has the proper stamp affixed to it, and that the Court will itself raise the objection, whether it be taken by the other party or not.³ And a Court of Equity cannot any more than a Court of Law receive parol evidence of the contents of a written agreement, which appears never to have been stamped, even where it is proved to have been fraudulently destroyed by the party against whom it is sought to be enforced.⁴ If the instrument objected to is of such a nature, that a stamp may be affixed to it on payment of a penalty, the Court will permit it to be so stamped, and will, for that purpose, permit the cause to stand over.⁵

After the plaintiff's evidence has been read, the rest of the counsel for the plaintiff make their observations and arguments. Then the defendant's counsel go through the same process for him. The leading counsel for the plaintiff is then heard in reply, and

¹ *Newton v. Ricketts*, 2 Phil. 620.

² *Gee v. Gurney*, 8 Beav. 315. By Chancery Rule 13, § 10, of New Jersey, no documentary evidence, which is not made an exhibit before the Master, shall be read at the hearing of the cause.

³ 17 & 18 Vict. c. 125, s. 28.

⁴ *Smith v. Henley*, 1 Ph. 391; *Hart v. Hart*, 1 Hare, 1.

⁵ *Ibid.*; *Coles v. Trecothick*, 9 Ves. 234; *Carrington v. Pell*, 3 De G. & Sm. 516. As to objections to probates for want of a proper stamp, see ante, p. 328. See ante, 876, for the provisions of the recent Stamp Act.

concludes the argument.¹ When all are heard, the Court pronounces the decree, the minutes of which are generally taken down by the Registrar, and are sometimes read, by him, openly in Court.²

The course of proceeding is much the same, where the answer has not been replied to, and the cause has been set down for hearing, upon bill and answer only; in such case the practice has been that the answer is read, and must be admitted to be true in all points;³ and no other evidence has been permitted, unless matters of record to which the answer refers, and are provable by the record itself.⁴ Now, there is an exception to this rule upon a motion for decree. In this case the plaintiff does not reply, but the answer is treated as an affidavit.⁵

If the plaintiff goes to hearing on bill and answer, and the Court shall not see cause to make a decree thereupon, for want of sufficient matter confessed by the answer, the bill will be dismissed with costs.⁶

¹ Hind, 412. See *Higdon v. Higdon*, 6 J. J. Marsh. 49. Where there are two defendants, who set up adverse claims, the course of practice is for the plaintiff to open; for the defendant who sets up a claim against the other then to go on, and for the other defendant to answer; and there is no reply between the defendants, unless specially directed by the Court. *Walton v. Van Mater*, Halst. Dig. 175. For the mode of proceeding in Maine, see Rule 18, Chancery Practice, 37 Maine, 588, 589.

² Ibid. See post, "Decrees." In New Hampshire, when an answer is delivered to the plaintiff's solicitor, the plaintiff shall, within one month, amend his bill by leave of the Court or one of the Justices, and deliver his amendment to the defendant's solicitor, or deliver to such solicitor his replication, or his exceptions allowed by the Court, if not submitted to by the defendant, otherwise the case shall be heard as of course on the bill and answer. Rule 17 of Chancery Practice, 38 N. Hamp. 608.

³ See *Childs v. Horr*, 1 Clarke, (Iowa,) 432; *Warren v. Twilley*, 10 Maryland, 39. Whether the matters stated in it are responsive to the bill, or of pure avoidance. Ante, 840, notes. And this rule prevails even where the defendant only avers that he believes and hopes to be able to prove such facts. *Brinckerhoff v. Brown*, 7 John. Ch. 217; *Dale v. McEvers*, 2 Cowen, 18.

⁴ But documentary evidence cannot be read to show facts not stated in the pleadings. *Anonymous*, 1 Barb. Ch. 73. In a hearing on the bill and answer, averments in the bill which are denied on oath in the answer will not be taken to be true. *Tainter v. Clark*, 5 Allen, 66.

⁵ Ante, p. 822.

⁶ Unless the objection might have been taken by demurrer, and the defendant has failed to do so, in which case the bill will be dismissed without costs. *Hollingsworth v. Shakeshaft*, 14 Beav. 492.

In general, where a cause has been brought on for hearing upon bill and answer, and the plaintiff fails in making out his case for want of a full admission of it by the answer, the Court will permit him (if he desires it) to reply, on paying down five pounds,¹ and such other costs as the Court shall think fit, for the day, within four days after such hearing.² Thus, where a bill was brought against three several executors of three joint factors, one of whom swore "he believed and hoped to prove" that the plaintiff was satisfied his demands, whereupon the plaintiff replied against the other two, and brought the cause on by bill and answer against the third, it was insisted that the plaintiff could have no decree for thus bringing on his cause; for though the defendant had not directly sworn by his answer that the money was paid, yet as he had sworn he believed and hoped to prove it paid, and the plaintiff by not replying had precluded him from the benefit of his proof, what the defendant stated upon his belief must be taken to be true, and the plaintiff was ordered to pay the costs and left at liberty to reply to the answer of the other defendants.³

If a cause, instead of being ordered to stand over for want of parties, is struck out of the paper, so that it is necessary again to set it down and to serve fresh subpoenas to hear judgment, the defendant, if the cause is again set down, is, as we have seen, to be allowed the taxed costs occasioned by the first setting down, although he do not obtain the costs of the suit.⁴

¹ This was formerly the amount of costs of the day, but they are now increased to 10*l*. 35th Ord. 1828, ante, p. 757.

² *Rogers v. Mitchell*, 41 N. Hamp. 160.

³ *Barker v. Wild*, 1 Verm. 140.

⁴ Ante, p. 993.

CHAPTER XXV.

OF DECREES.

SECTION I. — *General Nature of Decrees.*

A DECREE is the term applied to a sentence or order of a Court of Equity, in the same manner as the word judgment is used with reference to a Court of Law.¹

It is either *interlocutory* or *final*: in strictness a decree is interlocutory until it is signed and enrolled;² but the term is more

¹ A decree in Equity is for most purposes, if not for all, of as high a dignity and character as a judgment in a Court of Law. Story Eq. Pl. § 790; Hopkins v. Lee, 6 Wheat. 109; Wash. Bridge Co. v. Stewart, 3 Howard (U. S.) 413; Crandall v. Gallup, 12 Conn. 365; Calkins v. Evans, 5 Indiana, 441. It is equivalent to a judgment at law as to the distribution of assets. Thompson v. Brown, 4 John. Ch. 636; Woddrop v. Price, 3 Desaus. 206; Blake v. Heyward, 1 Bailey Eq. 208. See Phillips v. Thompson, 3 Stew. & Port. 369.

A decree cannot be incidentally assailed, but is conclusive as to the rights and liabilities of the parties until reversed by the appellate Court, or impeached by an original bill for fraud in obtaining it, or attacked for palpable error, by bill of review. Sanders v. Gatewood, 5 J. J. Marsh. 328; Watson v. Williams, 8 Ired. Eq. 232; Gardiner v. Miles, 5 Gill, 94; Hunter v. Hutton, 4 Gill, 115. The conclusiveness of a decree is not affected by any difference between its being obtained by consent or by a decision of the Court on the legal principles involved. Gifford v. Thorn, 1 Stockt. (N. J.) 702.

A decree authorizing a sale of all the real estate of a party, is good, as evidence, against all the world, so far as the transfer of the right of such party to another, or to a purchaser under such a decree, is concerned. Ryder v. Inverarity, 4 Stew. & Port. 14.

All persons who are parties or privies to a decree are bound by it. Gould v. Stanton, 16 Conn. 12; Young v. Henderson, 4 Hayw. 189; M'Whorter v. Standifer, 2 Porter, 519; Marrigauld v. Deas, 1 Bailey, Eq. 284; McCall v. Harrison, 1 Brock. 126. But none others. Brown v. Wincoop, 2 Blackf. 230; Canby v. Ridgway, Halst. Dig. 175; Dale v. Roosevelt, 1 Paige, 35; Garnett v. Mason, 6 Call. 308; Este v. Strong, 2 Ohio, 404; Moseley v. Cocke, 7 Leigh, 224; Griswold v. Jackson, 2 Edw. Ch. 461; Matthews v. Roberts, 1 Green Ch. 338.

The rights of third persons, not parties to a suit, are not affected by the decree therein, although such decree is binding and conclusive with respect to the subject-matter on which it acts. Beers v. Broome, 4 Conn. 247; Bailey v. Robinson, 1 Grattan, 4; McCall v. Harrison, 1 Brock. 126; Buford v. Buckner, 4 J. J. Marsh. 551. But see Goss v. Singleton, 2 Head, (Tenn.) 67.

² For. Rom. 183.

generally applied to decrees, in which some inquiry as to matter either of law or of fact is directed preparatory to a final decision.¹

Since the abolition of the Master's office and other recent changes in the forms and practices of the Court, the old distinction between final and interlocutory decrees has almost vanished. Orders on motions in former times were always deemed interlocutory,² but now, as we have seen, decrees or decretal orders may be made on motions which are, to all intents and purposes, final in their effect. Moreover, although, according to the existing practices, it frequently happens that some of the most important questions of the cause are left undetermined upon the first hearing, and accounts or inquiries only are directed preliminary to a final decree, yet even in such cases the form of the first decree is "that the further consideration of the cause be adjourned," and when the cause comes on again it is set down "for further consideration."³

¹ See *Thompson v. Peebles*, 6 Dana, 391; *Dunbar v. Woodcock*, 10 Leigh, 629; *Teaff v. Hewitt*, 1 Ohio (State) 511. An order in an Equity suit directing the trial of a question of fact by a jury is an interlocutory order; and in Massachusetts this order may be made by the Supreme Judicial Court when held by a single Judge. *Eames v. Eames*, 16 Pick. 141; *Ward v. Hill*, 4 Gray, 593, 595. See also Genl. Sts. c. 113, s. 6. And such order may be set aside at a subsequent term of the Court. *Dabbs v. Dabbs*, 27 Alabama, 646. But in Massachusetts the order for an issue is not open to exception. *Crittenden v. Field*, 8 Gray, 626; *Ward v. Hill*, 4 Gray, 593.

² See *Ogilvie v. Knox. Ins. Co.* 2 Black (U. S.) 539.

³ Seton on Decrees, last edition, General Order, 4th March, 1853. In the United States Chancery Courts where the right to appeal is limited to final decrees, the words "final decrees" have not been held to their strict and technical sense, but a more liberal construction has been given to them. *Fongay v. Conrad*, 6 Howard (U. S.) 203. Thus, in the case of *Whiting v. Bank of U. S.*, 13 Peters, 15, it was held, that a decree of foreclosure and sale of mortgaged premises was a final decree, and the defendant entitled to his appeal without waiting for the return and confirmation of the sale by a decretal order. And this decision is placed by the Courts upon the ground, that, the decree of foreclosure and sale was final upon the merits, and the ulterior proceedings but a mode of executing the original decree. The same rule of construction was acted on in *Michoud v. Girod*, 4 Howard (U. S.) 503.

In *Forgay v. Conrad*, 6 Howard (U. S.) 204, Taney, C. J., said: "When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the plaintiff, or directs it to be sold, or directs the defendant to pay a certain sum of money to the plaintiff, and the plaintiff is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to the Supreme Court, although

Until recently it was not usual for the first hearing of a cause to be final, or to attempt in terms to conclude the case.

If any matter of fact was strongly disputed, a feigned issue was directed to a Court of Law.

Even if the facts were, in the opinion of the Court, sufficiently clear, but a difficult point of pure Law, as distinguished from Equity, arose, it was the practice to direct a case for the opinion of a Court of Common Law. In that case the final decision was reserved until after the trial of the issue, or the delivery of the opinion of the Judges upon the case.¹ The tendency of modern changes has been most materially to diminish the number of delays of this description. The practice of sending cases for the opinion of a Court of Common Law is wholly abolished, and a Court of Equity has full power to determine any question of Law which, in the judgment of the Court, shall be necessary to be decided previously to the decision of the equitable question at issue between the parties.² And though the power of directing actions at Law still remains, yet there are many reasons why it is more sparingly exercised than in former times.

By the 62d section of the 15 & 16 Vict. c. 86, it is enacted, that "In cases where, according to the present practice of the Court of Chancery, such Court declines to grant equitable relief until the so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed." "This rule of course does not extend to cases where money is directed to be paid into Court, or property to be delivered to a receiver, or property held in trust to be delivered to a new trustee appointed by the Court, or to cases of a like description. Orders of that kind are frequently and necessarily made in the progress of a cause. But they are interlocutory only, and intended to preserve the subject-matter in dispute from waste or dilapidation, and to keep it within the control of the Court until the rights of the parties concerned can be adjudicated by a final decree."

¹ In Massachusetts, if, upon making an interlocutory decree or order, the Justice is of opinion that it so affects the merits of the controversy that the matter ought to be determined by a Court of Law before further proceedings are had, he may report the question for that purpose, and stay all further proceedings except such as are necessary to preserve the rights of the parties. Genl. Sts. c. 113, s. 12. And it is also provided that "the Justice by whom a case is heard for a final decree may reserve and report the evidence and all questions of law therein, for the consideration of the full Court, and thereupon like proceedings shall be had as in appeals from final decrees." Genl. Sts. c. 113, s. 15.

² 15 & 16 Vict. c. 86, s. 61. See *Trustees of the Birkenhead Docks v. Laird*, 4 De G. Mac. & Gor. 732.

legal title or right of the party or parties seeking such relief shall have been established in a proceeding at Law, the said Court may itself determine such title or right without requiring the parties to proceed at Law to establish the same."

Before this section was enacted, in a great number of cases where the equitable remedy was contingent upon a legal right, and the legal right was disputed, the Court of Chancery used to decline making any order until the legal right had been established in a Court of Law; and when to preserve the property in dispute, or to prevent any immediate injury, an injunction was granted in the first instance, it was an invariable rule that some provision should be made in the order for putting the matter in the course of legal investigation. Now, in many cases of this description, parties are able to apply either to a Court of Equity or to a Court of Common Law, with a certainty that either tribunal, whichever they may select, is competent to give complete relief.¹ It must be recollected that in cases involving the decision of any purely legal question, the presence of a Common Law Judge may be obtained.²

Sometimes the object of the suit is a commission for a partition of lands,³ or so settle their boundaries; in such cases, also, the first decree is not generally final, the further directions, or further consideration as it is now termed, being reserved till after the commission has been returned. But the most usual ground for not making a perfect decree, in the first instance, is the necessity which frequently exists for making inquiries, or to take accounts or sell estates, and adjust other matters which are necessary to be disposed of, before complete decision can be come to upon the subject-matter of the suit.⁴

¹ 15 & 16 Vict. c. 76, s. 226.

² 14 & 15 Vict. c. 83, s. 8; *Deerhurst v. Jones*, 16 Jur. 988.

³ In Massachusetts, there is no general jurisdiction in equity to make partition of lands, there being a complete and adequate remedy at common law; but persons who are interested as joint tenants, tenants in common, or otherwise, in any mill privilege, water right, or other incorporeal hereditament, may be compelled to divide the same, either by suit in Equity, in the Supreme Judicial Court, or in the manner provided for the division of land in Courts of Common Law. Genl. Sts. c. 136, s. 77. See *Hodges v. Pingree*, 10 Gray, 14.

⁴ A decree authorizing an executor to sell the lands of his testator, for the payment of debts, and to report his proceedings in execution thereof to the Court, is not final, but an interlocutory decree. *Goodwin v. Miller*, 2 Munf. 42. It is said by Judge Spencer, in *Jaques v. Method. Epis. Church*, 17 John. 558, that no case can be found in which a decree, directing a reference to a Master, or a

It may here be mentioned, that there are some cases in which it is a rule of the Court not to make any decree whatever till certain preliminary inquiries have been made ; this rule is invariably acted upon in suits for the specific performance of contracts, and the Court will not permit the question, whether a good title can be made or not, to be argued before it, in the first instance, even though the objections to the title are stated and the questions arising upon them are properly raised by the pleadings. The principles upon which this practice was founded are clearly laid down by Lord Eldon, in *Jenkins v. Hiles*,¹ and are apparently applicable to the present day.

It may be noticed here, that the terms in which the direction for a reference, as to the title of a vendor, is framed, are not to inquire whether he could make a good title at the time of entering into the contract, but whether he can, *i. e.* at the time of the reference, make a good title ;² and, under such reference, it has been held, that if the vendor can show a good title, at any time before the certificate, it will entitle him to a decree ;³ and, even after

feigned issue, for the purpose of ascertaining any material fact in the case, has been held to be a final decree. See *Travis v. Waters*, 12 John. 500.

¹ 6 Ves. 646 ; *Gaston v. Frankum*, 2 De G. & Sm. 561.

² *Langford v. Pitt*, 2 P. Wms. 630. But see *Richmond v. Gray*, 3 Allen, 25.

³ *Mortlock v. Buller*, 10 Ves. 292, 315 ; *Hepburn v. Dunlap*, 1 Wheat. 179. A Court of Equity will not decree the specific performance of an agreement of sale, and oblige the purchaser to accept a title, which the vendor cannot make out to be clearly good and free from incumbrance. *Butler v. O'Hear*, 1 Desaus. 282 ; *Lewis v. Herndon*, 3 Litt. 358 ; *Kelley v. Bradford*, 3 Bibb. 317 ; *Seymour v. Delancey*, 1 Hopk. 436 ; *Young v. Lillard*, 1 Marsh. 482 ; *Morgan v. Morgan*, 2 Wheat. 290, 299 ; *Reed v. Noe*, 9 Yerger, 283 ; *Watts v. Waddle*, 6 Peters, 389 ; 1 Sugden, V. & P. (7th Am. ed.) 505 *et seq.*, and notes ; *Gans v. Renshaw*, 2 Barr. 34.

"A Court of Equity will not now compel a purchaser to accept a title, which is so doubtful that it may expose him to litigation, though the Court may believe it to be good." *Chapman J.*, in *Richmond v. Gray*, 3 Allen, 27 ; *Park v. Johnson*, 7 Allen, 383. See *Fry on Contr.* § 573 *et seq.* ; *Pyrke v. Waddingham*, 10 Hare, 1. A purchaser cannot be compelled to take land, which is involved in doubt or dispute as to boundary. *Voorhees v. De Meyer*, 3 Sandf. Ch. 614.

It is sufficient, however, if the vendor is able to make out a good title before decree pronounced, although he had not a good title when the contract was made. *Hepburn v. Auld*, 5 Cranch, 262, 275 ; *Finley v. Lynch*, 3 Bibb, 566 ; *Tyree v. Williams*, 3 Bibb, 366 ; *Seymour v. Delancey*, 3 Cowen, 445 ; *Pierce v. Nichols*, 1 Paige, 244 ; *Colton v. Ward*, 3 Monroe, 304, 313 ; *Baldwin v. Salter*, 8 Paige, 473 ; *Dutch Church, &c. v. Mott*, 7 Paige, 78. Unless the vendee has objected to a completion of the purchase, seasonably, after discovering the want of title

the certificate, if the vendor can satisfy the Court that he can make a good title, by clearing up the objections, the Court will make a decree in his favor.¹

It is to be observed, that the question, whether a vendor was or was not able to make a good title, at the time of the reference, is a very material one with reference to costs, though not with reference to the decree for a specific performance,² the rule of the Court being, that a vendor is not entitled to costs, except from the time when his title is reported complete; and that, up to that time, he must pay costs himself.³ In consequence of this rule, the Court adopted the practice, at the same time that it inquires into the vendor's title, to direct the Master, in case he should be of opinion that a good title can be made, to inquire and state to the Court, when it was first shown that it could be made.⁴ The

in his vendor. *Richmond v. Gray*, 3 Allen, 29, 30, 31; *Wynn v. Morgan*, 7 Vesey, 202; *Hoggart v. Scott*, 1 Russ. & My. 293; *Hepburn v. Auld*, 5 Cranch, 189. When there is any doubt or difficulty about the title, it is usually referred to a Master to be examined and reported on. *Pierce v. Nichols*, 1 Paige, 246; *M'Comb v. Wright*, 4 John. Ch. 659, 670. But Equity will not relieve a purchaser who had a full knowledge of the defect in the title; *Craddock v. Shirley*, 3 Marsh. 288; or if his conduct has amounted to a waiver of the objection. *Roach v. Rutherford*, 4 Desaus. 126. See *Ramsey v. Brailsford*, 2 Desaus. 590, 591; *Barrett v. Gaines*, 8 Ala. 373.

There are many cases where Courts of Equity have, upon their own opinion, compelled an unwilling purchaser, to accept a title depending on questions of great nicety. 1 Sugden V. & P. (7th Am. ed.) 516 *et seq.*, and notes; *Scott v. Nixon*, 3 Dru. & War 388; *Kirkwood v. Lloyd*, 12 Irish Eq. 585.

In the case of *Scott v. Nixon*, *ubi supra*, Lord Chancellor Sugden compelled an unwilling purchaser to take a title depending upon parol evidence of possession under the English Statute of Limitations. See further on the subject of enforcing specific performance in cases of doubtful and defective titles, *Tomlin v. M'Chord*, 5 J. J. Marsh. 136; *Beale v. Seiveley*, 8 Leigh, 658; *Bryan v. Reed*, 1 Dev. & Bat. Eq. 86; *Watts v. Waddle*, 1 M'Lean, 200; *Cooper v. Denne*, 4 Bro. C. C. (Perkins's ed.) 87, 88, and notes; *Roake v. Kidd*, 5 Sumner's Ves. 647, Perkins's note (a); *Omerod v. Hardman*, *ib.* 722, note; *Garnett v. Macon*, 6 Call, 308; *Reed v. Noe*, 9 Yerger, 283; 1 Sugden V. & P. (7th Am. ed.) 505 *et seq.*, and notes.

¹ *Paton v. Rogers*, Mad. & Geld. 256.

² *Seton v. Slade*, 7 Ves. 279.

³ *Harford v. Purrier*, 1 Mad. 532; *Wynn v. Morgan*, 7 Ves. 202; *Wilson v. Allen*, 1 J. & W. 623.

⁴ *Seton on Decrees*, 209. If the plaintiff in a bill in equity for specific performance of an agreement for an exchange of lands cannot give the title mentioned in the agreement, the bill may be dismissed, although the objection is not

abolition of the Master's office may have slightly varied the form, but this practice continues in substance.¹

It is to be recollected,² that it is a fundamental principle of Courts of Equity to make as complete a decision upon all the points embraced in a cause, as the nature of the case will admit, so as to preclude, not only all further litigation between the same parties, but the possibility of the same parties being at any future period disturbed or harassed, by other parties claiming the same matter, as well as of any danger that may exist of injustice being done to other parties who are not before the Court in the present proceedings.³

By the original practice the Court, in all cases relating to the distribution of the estate of an intestate, before it made any decree affecting the estate, or even ordered an account of it to be taken, directed a Master of the Court to inquire who were the next of kin of the intestate, at the time of his decease, and whether any of them were living or dead, and, if dead, who were their personal representatives.

An inquiry of this nature was always directed in cases in which any part of the property in question in the cause devolved upon the next of kin, whether it were upon a total, or upon a partial or constructive intestacy.

The same course was generally pursued in other cases in which there was a fund distributable amongst persons constituting a particular class, consisting of numerous individuals, as in the case of a bequest to the cousins of a testator; in such cases, as well as in that of intestacy, the Court, before it directed any steps to be taken, either towards a distribution, or for ascertaining the amount of the fund, satisfied itself, by a previous reference to the Master, stated in the answer or taken until a hearing before a Master to whom the case has been referred to settle a proper conveyance. *Park v. Johnson*, 7 Allen, 378.

¹ For a modern form of decree, see Seton, 239.

² In order to prevent delay and unnecessary expense, the Court has adopted the practice in suits of this nature, where the title of the vendor only is in dispute, of directing references to be made to the Master, to inquire into the vendor's title, upon motion, either before or after answer. See *post*, "Interlocutory Applications."

³ Where a lien creditor brings a bill in behalf of himself and other creditors of the same class, and with similar rights, the decree should provide proper relief for all of them. *Trustees of the Wabash and Erie Canal Co. v. Beers*, 2 Black (U. S.) 448.

that all the individuals, constituting the class amongst whom the fund was distributable, were parties to the proceeding: it also adopted the same course of proceeding, where the property was distributable between one or two or more classes of individuals: thus, where the plaintiffs filed their bill in the character of next of kin, an inquiry has been directed as to whether they did or did not come within that description.¹

Such an order was "a preliminary interlocutory order, with a view to inquiry, before the Court could do anything determining the rights of the parties."²

The first innovation in this practice was made by the 5th Order of May, 1839, which directed, "That in all cases in which it shall appear that certain preliminary accounts and inquiries must be taken and made, before the rights and interests of the parties to the cause can be ascertained, or the question arising therein can be determined, the plaintiff shall be at liberty, at any time after the defendant shall have appeared to the bill, to move the Court on notice, that such inquiries and accounts shall be made and taken,³ and that an order referring it to the Master to make such inquiries, and take such accounts, shall thereupon be made without prejudice to any question in the cause, if it shall appear to the Court that the same will be beneficial to such (if any) parties to the cause as may not be competent to consent thereto; and that the same is consented to by such (if any) of the defendants as being competent to consent have not put in their answer to the bill; and that the same is consented to by, or is proper to be made upon the statements contained in the answer of such (if any) of the defendants as have answered the bill."⁴

¹ *John v. Jones*, *ubi supra*.

² See *Horwood v. Schmedes*, 12 Ves. 311, 315.

³ A decree, ordering an account, is not such a final decree or determination of the cause, as will authorize an appeal from it. *Berryhill v. M'Kee*, 3 Yerger, 157; *Perkins v. Fourniquet*, 6 Howard (U. S.) 206; *Pulham v. Christian*, 6 Howard (U. S.) 209. Nor will the ascertainment of the account be evidence in another suit, if the bill has been dismissed on motion of the plaintiff before a final decree. *Capell v. Landano*, 34 Alabama, 135. See *Carter v. Privatt*, 3 Jones Eq. (N. C.) 345.

⁴ Where a bill seeks for a decree for an account, and the defendant submits to such a decree, no proof in reference to the matters of account is, in the first instance, required, but such a decree will be entered of course. *Dozier v. Sprouse*, 1 Jones Eq. (N. C.) 152. The Chancellor must, however, first be satisfied that the plaintiff is entitled to have an account taken. If he is satisfied upon that point, the

This order can be obtained even after the cause is set down for hearing, if the case is in other respects suitable,¹ but it will be refused when the title of the plaintiff to sue is not admitted by the answer,² or where granting the motion would involve a decision upon some of the points in the cause.³ It seems, moreover, that such an order cannot be obtained, where some of the defendants are out of the jurisdiction.⁴

An order of this kind obtained in an administration suit does not contain a direction for the payment of the debts of the testator, and therefore has not the same effect as a decree in entitling the executors to restrain a creditor suing then at Law.⁵ But the cause may be brought on for hearing and a decree obtained before the report is made, or a direction may be inserted in the order excluding the creditors who do not come in from the benefit of the order; and then payment of the debts may be at once directed by the original decree.⁶

A decree for account gives an interest in the suit for many purposes to a defendant, and an order for preliminary accounts has so far the same effect, as that upon the death of a sole plaintiff a defendant has been allowed to file a supplemental bill.⁷

This order is still in force, and may be acted upon, though of course all future references will be to the Judge himself in cham-

practice is to refer the case to a Master to state the details of the account, and ascertain the balance. But the Chancellor may, if he sees fit, take the account himself. He should, however, refuse an account, if he is satisfied upon the evidence that nothing is due the plaintiff, or that for any cause an account ought not to be decreed. He may arrive at this conclusion by evidence independent of the account. *Campbell v. Campbell*, 4 Halst. Ch. (N. J.) 743.

It is a universal rule in Equity, that upon a bill for an account, the party against whom the balance is found will be decreed to pay it. Sometimes that order is contained in the original decree for the account. Sometimes, and usually in modern practice, it is not made until the account is taken and the final decree made, but it forms an essential part of the relief upon the bill. *Green C. J.*, in *Campbell v. Campbell*, 4 Halst. Ch. (N. J.) 740, 741.

¹ *Strother v. Dutton*, 10 Sim. 288.

² *Topham v. Lightbody*, 1 Hare, 289; *Wilson v. Applegarth*, 10 Sim. 657; *Belcher v. Whitmore*, 7 Beav. 245; *Kinshela v. Lee*, 7 Beav. 300.

³ *Curd v. Curd*, 2 Hare, 116; *Breeze v. English*, *ibid.* 118; *Frost v. Hamilton*, 4 Beav. 33; *Lee v. Shaw*, 10 Sim. 369.

⁴ *Barrett v. Buck*, 2 Hare, 520; *Meinertzen v. Davis*, 10 Sim. 289.

⁵ *Teague v. Richards*, 11 Sim. 45.

⁶ *Trollor v. Walmesley*, 7 Beav. 264.

⁷ *Upjohn v. Upjohn*, 4 Beav. 246.

bers, and not to the Master. It must, however, be observed, that the recent changes have given more convenient means of obtaining the report, for the purpose of which this order was made.

In the first place the plaintiff may now, as we have seen, move for a decree, directing the necessary inquiries to be made, or accounts taken.

Or the Court may receive evidence by affidavit at the hearing, upon all the points that in former times were made the subject of preliminary inquiries.

Or under the 13 & 14 Vict. c. 35, s. 24, the Court may restrain proceedings against executors and administrators, after the filing of the report mentioned in the 19th section of the Act; or under the 14 & 15 Vict. c. 86, s. 42, rule 9, the executor or administrator may obtain a decree for the administration of the estate, without having all the parties interested before the Court; they may be summoned afterwards before the Judges in chambers, as we shall see hereafter in the chapter on the subject.¹

The same observations apply to orders made in foreclosure suits, under the statute 7 Geo. II. c. 20, upon application by the defendant, having the right to redeem, for a reference to inquire into the amount of the principal money and interest due to the mortgagor.²

Orders made upon petitions, addressed to the Court in a summary manner, either on behalf of infants, or under the authority of Acts of Parliament, also come under the denomination of decretal orders; as do also those orders which are made upon petitions, presented under the authority of decrees, which, although final with regard to the persons having the immediate interest in the property in the hands of the Court, reserve a right to parties who, upon the determination of the immediate interest, shall be interested in the property, to apply to the Court touching the same, as they shall be advised.

Orders made under the Trustees Relief Act, which will be included in a subsequent chapter, are frequently final and decisive upon material interests, though they are made upon petition, and not in regularly constituted suits.

When a decree does not adjourn the consideration of the cause, it may be said to be a "final decree," and, when duly signed and

¹ 18th Order of 16th October, 1852; and see post, Chapter on Proceedings in Chambers.

² See *Johnson v. Everett*, 9 Paige, 636; *Kane v. Whittick*, 8 Wendell, 219.

enrolled, may be pleaded in bar to any new bill for the same matter.¹ Of this nature is a decree² dismissing the plaintiff's bill,

¹ The order for dismissing a bill at the hearing is not usually termed, in the books, "a decree," but merely "an order of dismissal"; but, to prevent confusion, it is thought best to designate it as "*a decree*," to distinguish it from "an order to dismiss" made upon motion.

When a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the Court, so that it will not be necessary to bring the cause again before the Court, for its final decision, it is a final decree. *Mills v. Hoag*, 7 Paige, 18; *Cook v. Bay*, 4 How. (Miss.) 485; *Britton v. Johnson*, C. W. Dud. 24; *Tennent v. Patton*, 6 Leigh, 196; *Talbot v. Todd*, 7 J. J. Marsh. 456; *Johnson v. Everett*, 9 Paige, 636; *Crittenden, ex parte*, 5 Eng. 333. See per Sutherland J. in *Kane v. Whitman*, 8 Wendell, 224; *Harney v. Branson*, 1 Leigh, 108; *Longfellow v. Longfellow*, 1 Clarke, 344; *Hey v. Schooley*, 7 Ohio, 48; *Brewer v. State of Connecticut*, 9 Ohio, 117; *Newark Plank Road Co. v. Elmer*, 1 Stockt. (N. J.) 754, 787. A decree to sell mortgaged premises is a final decree, and is not opened by an appeal from the decree confirming the sale. *Hey v. Schooley*, 7 Ohio, 48; *Bronson v. R. R. Co.*, 2 Black (U. S.) 524. A decree may be final although it directs a reference to a Master; if all the consequential directions depending upon the result of the Master's report are contained in the decree, so that no further decree of the Court will be necessary, upon the confirmation of the report, — to give the parties the entire and full benefit of the previous decision of the Court. *Mills v. Hoag*, 7 Paige, 18; *Quackenbush v. Leonard*, 10 Paige, 131. See *Story v. Hawkins*, 8 Dana, 14; *Girod v. Michoud*, 4 Howard, 503; *Forgay v. Conrad*, 6 Howard, 203, 204. For cases of this character, see *Larue v. Larue*, 2 Litt. 261, where it was held, that a decree directing land to be conveyed and appointing a commissioner to convey it, is final. See *Mackey v. Bell*, 2 Munf. 154. So, a decree ascertaining the amount due, directing a sale, and giving costs, is a final decree; *Field v. Ross*, 1 Monroe, 137; although it directs the taxation of costs. *Craig v. Steamer Hartford*, 1 McAll. C. C. (Cal.) 91. A decree upon the coming in of the Master's report, on a bill for specific performance, ascertaining the quantity of land to be conveyed, and the balance of money to be paid, that the conveyance should be executed on such balance being tendered, is a final decree. *Travis v. Waters*, 1 John. Ch. 85. See *Taylor v. Read*, 4 Paige, 561. A decree foreclosing a mortgage, though there may be subsequent decrees in the same cause, is a final decree. *Graham v. Hardin*, 4 Dana, 559; *Whiting v. Bank of U. S.*, 13 Peters, 15. So, a decree for the specific sums of money in the bill mentioned, and for a partition of land, which appoints commissioners to make the partition of the land, and directs them to report at the next term of the Court, is final. *Talbot v. Todd*, 7 J. J. Marsh. 459. But a decree, which though disposing of the main principles of the case, directs an inquiry by a commissioner as to matters which require a report to be made at a subsequent term, and contains no decree for costs, is not such a decree as will sustain a writ of error. *Garrard v. Webb*, 4 Porter, 73. A decretal order, upon

² Ante, p. 683; 117th Order of May, 1845, ante, p. 800. Strictly speaking, the term final decree is only applicable to decrees which have been signed and enrolled, ante, p. 1000.

which, as we have seen before, may be pleaded in bar to a new suit,¹ unless accompanied with a direction that the dismissal is to be without prejudice to the plaintiff's right to file another bill.²

which an execution may be taken out is a final decree. *Haskell v. Raoul*, 1 M'Cord Ch. 32.

When a decree is made as to one of several defendants, whose interests are not at all connected with each other, with a direction for the payment of costs as to that defendant, such decree is final as to him, although the cause may still be pending in Court as to others. *Royal v. Johnson*, 1 Rand. 421. See *M'Coun v. Delany*, 2 Bibb, 441. A decree upon a bill of interpleader, that a bill is properly filed, is a final decree. *Atkinson v. Manks*, 1 Cowen, 691. Decrees are final, after the end of the term at which they are rendered, unless specially entered otherwise; and they are final after entered up as final on some day before the end of the term, with a view to other proceedings upon them as to final decrees. *Jenkins v. Eldredgs*, 1 Wood. & Minot, 61.

¹ A decree dismissing a bill upon its merits, is conclusive until reversed, and is a good plea in bar to a second bill for relief on the same subject-matter. *Bigelow v. Winsor*, 1 Gray, 299; *Foot v. Gibbs*, 1 Gray, 412; *Durant v. Essex Company*, 8 Allen, 103; *Holmes v. Remsen*, 7 John. Ch. 286; *Hall v. Dodge*, 38 N. Hamp. 350, 351; *Story Eq. Pl. § 793*; *Mitf. Eq. Pl. 238*; 2 *Story Eq. Jur. § 1523*; *Sayles v. Tibbitts*, 5 Rhode Is. 79; *Pugh v. Holt*, 27 Miss. (5 Cush.) 461; *Neafie v. Neafie*, 7 John. Ch. 1; *Perine v. Dunn*, 4 John. Ch. 140; *Estep v. Watkins*, 1 Bland, 486; *Curtis v. Bardstown*, 6 J. J. Marsh. 536.

A decree of the Supreme Court of the United States affirming with costs a decree of the Circuit Court for the district of Massachusetts by which a bill in Equity had been dismissed after a hearing, was held, in *Durant v. Essex Company*, 8 Allen, 103, to be a bar to a subsequent suit in Equity in the State Court of Massachusetts for the same cause, between the same parties, although it appeared by the record of the Supreme Court that such decree was passed by a divided Court.

If a bill in Equity to redeem land from a mortgage, and requiring an answer under oath, has been dismissed, upon motion of the plaintiff, and without the knowledge of the defendant, after the filing of the answer, and after the expiration of the time when, by the rules of the Court, the plaintiff was entitled to file a replication and take testimony, the decree for the defendant is conclusively presumed to be upon the merits, and is a bar to a subsequent bill for the same cause, brought by the same plaintiff, or by one who acquired his title *pendente lite*. *Borrowdale v. Tuttle*, 5 Allen, 377; *Foot v. Gibbs*, 1 Gray, 413.

But where a cause was set down for a hearing on the bill and answer, and the bill was dismissed with costs, because no person appeared for the plaintiff, and the decree was enrolled, the decree was held no bar to another suit for the same matter. *Rosse v. Rust*, 4 John. Ch. 300; *Ante*, 808, 809. Otherwise, where there was a replication filed and an order closing the proofs. *Osbury v. La Farge*, 2 Comst. 113.

² *Foot v. Gibbs*, 1 Gray, 412; *Bigelow v. Winsor*, 1 Gray, 299; *Gove v. Lyford*, 44 N. Hamp. 527; *Story Eq. Pl. § 793*. As to the effect of a dismissal without prejudice, see *Nevitt v. Bacon*, 32 Miss. (3 George,) 212; *Lang v. Waring*, 25 Alabama, 625.

Directions of this sort are inserted, where the dismissal is occasioned by any slip or mistake in the pleadings or in the proof: thus, formerly, where a bill was dismissed for want of parties, it was expressed to be without prejudice,¹ and so where a bill was dismissed, in consequence of facts not having been properly put in issue,² or of the agreement for the specific performance of which the bill was filed, turning out, upon the evidence, to be different from that actually proved.³

It is to be observed, that although a decree of dismissal of a bill, for the specific performance of an agreement, does not carry with it an implied injunction against a subsequent proceeding at Law, it has been the practice of the Court to insert in the decree of dismissal of such a bill, that it shall be without prejudice to a subsequent proceeding at Law, &c. ;⁴ but, whether it be introduced or not, the plaintiff, after his bill for a specific performance has been dismissed at the hearing, is still considered by the Court of Equity as at liberty to bring his action at Law, upon the contract,⁵ unless the Court thinks proper specifically to restrain him, by injunction, from so doing ;⁶ the most usual course of preventing a plaintiff from proceeding at Law, after a dismissal in a case of this nature, is to dismiss the bill without costs, on the plaintiff's undertaking not to bring an action ; this, however, is only by way of compromise.⁷

¹ Seton on Decrees, 382. Now, however, a bill is seldom dismissed for want of parties.

² *M'Neill v. Cahill*, 2 Bligh, 263.

³ *Woollam v. Hearn*, 7 Ves. 222 ; *Lyndsay v. Lynch*, 2 Sch. & Lef. 1 ; but see *Corporation of Rochester v. Lee*, 1 Mac. & G. 467, as to the value of such reservations in a decree. But where the decision of the Court that have examined a bill in equity, with the pleadings and evidence, is entered on the docket "dismissed," without other words of qualification, such entry is conclusive of the merits of the case, and a final determination of the controversy between the parties, both in equity and at law ; and a motion to amend the record by adding the words "without prejudice," will be denied. *Gove v. Lyford*, 44 N. Hamp. 525.

⁴ *Mortlock v. Buller*, 10 Ves. 292 ; *M'Namara v. Arthur*, 2 Ball & B. 349. A decree dismissing a bill for specific performance of a parol contract for land, is not a bar against the demand of the plaintiff for money he had advanced on the contract. *Webb v. Webb*, 6 Monroe, 165.

So a decree of dismissal, on a bill to foreclose a mortgage, is no bar to a subsequent suit on the note which it was given to secure. *Longworth v. Flagg*, 10 Ohio, 300.

⁵ See *Park v. Johnson*, 4 Allen, 261.

⁶ *Mortlock v. Buller*, 10 Ves. 292 ; *M'Namara v. Arthur*, 2 Ball & B. 349.

⁷ *Ibid.*

It is to be observed, that the Court will, sometimes, not only acknowledge the plaintiff's right to bring an action upon an agreement, although it dismisses his bill, but it will, in express terms, give him leave to bring his action upon the agreement.¹ This course of proceeding is not confined to cases of contracts; the Court will, in other instances, notwithstanding it decrees a dismissal of the bill, reserve to the plaintiff the right to bring an action at Law; and it not unfrequently happens, that the Court, instead of making a decree for an immediate dismissal of the bill, will direct it to be retained for twelve months, with liberty to the plaintiff, in the mean time, to proceed at Law, as he shall be advised; in which case, it forms a part of the decree, that, if the plaintiff shall not proceed at Law, and go to trial within the time aforesaid, the plaintiff's bill is from thenceforth to stand dismissed with costs.²

The cases in which the Court has hitherto retained the bill, with liberty to the plaintiff to proceed at Law, have been chiefly those in which it was necessary to establish his right at Law, in order to found the equitable relief;³ and the practice has never been allowed to enable the plaintiff to try whether he has any claim at Law; and if he fails there, to come into this Court and try to raise an equity.⁴ Now, as we have seen,⁵ the Court is no longer obliged to adopt this course to investigate the legal right, but may, should it so think fit, itself decide it.

In cases where default is made in bringing the action, the bill will not be out of Court, unless the decree expressly directs that, upon default, the bill is to stand dismissed "*without further order.*"⁶ In *Cator v. Dewar*,⁷ it was held, that such further order could not be obtained upon motion, and that the cause must be

¹ *Edwards v. Hockin*, Seton on Decrees, 382; *Corporation of Rochester v. Lee*, 1 Mac. & Gor. 469.

² Seton on Decrees, 356; *Wood v. Rowcliffe*, 2 Phil. 382; *Chappell v. Purday*, 2 Phil. 228.

³ *Walton v. Law*, 6 Ves. 150. When, on a bill for partition, where partition is a subject of Equity Jurisdiction, the legal title is disputed and doubtful, the course is to send the plaintiff to a Court of Law, to have his title first established. *Coxe v. Smith*, 4 John. Ch. 271; *Phelps v. Green*, 3 John. Ch. 302. See *Phillips v. Thompson*, 1 John. Ch. 132; *Pierpont v. Fowle*, 2 Wood. & Minot, 23, 36, 37; *Mohawk Bridge Case*, 6 Paige, 563.

⁴ *Ibid.*

⁵ *Ante*, p. 1002.

⁶ Seton on Decrees, 357.

⁷ *Ibid.*

set down again : but in *Stevens v. Praed*,¹ it was held, that it might be obtained on motion also.

It may be noticed, in this place, that, in general, when a bill is ordered to be dismissed upon a contingent event, the established rule is that such orders are not conclusive, unless the words "without further order" are annexed to the order ; and that, where such words are omitted, the defendant must apply for and obtain an absolute order of dismissal.

Although the general rule of the Court is, to make a complete decree upon all the points connected with the case, it frequently happens, that the parties are so circumstanced, that a decision upon all the points connected with their interests cannot be pronounced till a future period ; thus, for instance, the interest of a fund may belong to a person for life, and, after his death, the fund may be distributable amongst a particular class of individuals ; now, although the persons who form that class, as well as the tenant for life, must be and in general are before the Court at the time when the decree is pronounced, the Court will not, at that time, take upon itself to declare their interest in the fund ; because it is a rule, never to declare rights which are not immediately to be acted upon, lest events should occur, before the time of acting upon them, which may create an alteration in those rights. All that the Court, therefore, does under such circumstances, is to decree the interest of the fund to be paid to the person entitled to the dividends during his life, and to declare that, upon his death, the parties interested in the fund are to be at liberty to apply to the Court as they may be advised. The same sort of liberty is also given in any other case in which it may seem requisite ; and it is to be observed, that the effect of is not to alter the final nature of the decree. A decree, with such a liberty reserved, is still a final decree, and, when signed and enrolled, may be pleaded in bar to another suit for the same matter ; the effect of it is, however, to permit persons having an interest under it to apply to the Court touching such interest, in a summary way, either by petition or motion, without the necessity of again setting the case down.

It may be remarked, that applications, under such a reservation in a decree as that last mentioned, may be made either by motion

¹ *Ubi supra*. The order can be obtained even after the defendant has moved to dismiss ; *Swanger v. Gardner*, 3 De G. & Sm. 696.

or petition, except in cases where the object is to have money paid out of Court, in which case the application should be by petition.

It may be noticed in this place, that there are many cases of decrees which, although they are final in their nature, require the confirmation of a further order of the Court before they can be acted upon; of this nature are decrees in suits against infants, in which a day is given to the infant to show cause against it, after he attains twenty-one.¹ Of the same description, also, are decrees *pro confesso* made against a party absconding to avoid the process of the Court, under the 1st Will. IV. c. 36.² And in some cases also under the Orders of May, 1845.³

The most ordinary case in which a further order is necessary to

¹ Ante, pp. 154, 155; *Dow v. Jewell*, 1 Foster, (N. H.) 470; *Anderson v. Irvine*, 11 B. Monroe, 341. If the infant shows no cause within the specified time the decree is made absolute against him. 1 Newl. Ch. Pr. 501; *Gilb. For. Rom.* 160; *Harris v. Youman*, 1 Hoff. Ch. 178; *Brown v. Armistead*, 6 Rand, 594; *Jackson v. Turner*, 5 Leigh, 119; *Collard v. Groom*, 2 J. J. Marsh. 562. See *Wilkinson v. Oliver*, 4 Hen. & Munf. 150; *Braxton v. Lee*, *Ib.* 376; *Ewing v. Armstrong*, 4 J. J. Marsh. 68; *Funk v. M'Keoun*, *Ib.* 168; *Jameson v. Moseley*, 4 Monroe, 417; *Mills v. Dennis*, 3 John. Ch. 367; *Pope v. Lemaster*, 5 Litt. 77; *Beeler v. Bullitt*, 4 Bibb, 11; *Glaze v. Drayton*, 1 Desaus. 109; *Wilkinson v. Wilkinson*, 1 Desaus. 201; *Cole v. Miller*, 32 Miss. (3 George) 89. Under Missouri practice, it is not error, that a decree against infants, gives no day for them to show cause after they become of age. *Hendricks v. McLean*, 18 Mis. (3 Barnett,) 32; *Heath v. Ashley*, 15 Missouri, 393. As to Texas, see *Cannon v. Hemphill*, 7 Texas, 184. Under the statute, in Alabama, fixing a time within which minors can impeach a decree rendered against them, it is no error that a time is not fixed in the decree for that purpose. *Cato v. Easley*, 2 Stew. 214. But aside from the statute, a decree against infants must reserve their right to show cause against it after they are of age, or it will be erroneous. *Harlan v. Barnes*, 5 Dana, 223; *Lee v. Braxton*, 5 Call, 459. But see *Pickett v. Chilton*, 5 Munf. 467. An infant plaintiff is as much bound by a decree as a person of full age. *Gregory v. Molesworth*, 3 Atk. 626; *Williamson v. Johnson*, 4 Monroe, 255; *Jameson v. Moseley*, *Ib.* 416; *Jackson v. Turner*, 5 Leigh, 119; *Bank of U. States v. Ritchie*, 8 Peters (U. S.) 128. A decree against a *feme covert* is good until it is reversed. *Pillsbury v. Dugan*, 9 Ohio, 117. In general, a *cestui que trust* is not bound by a decree rendered against his trustees, in a suit to which the *cestui que trust* was not a party. *Collins v. Lofftus*, 10 Leigh, 5. No decree can be made against one on whom process has not been served, unless he has entered an appearance. *Ryan v. Blount*, Dev. Eq. 382.

² Ante, p. 501.

³ See ante, p. 502; Order 90, May, 1845.

complete the decree, is that of a decree for a foreclosure. Decrees of this nature, after directing an account to be taken of the principal and interest due to the plaintiff upon the mortgage, and the taxation of the costs, direct that, upon the defendant's paying to the plaintiff what shall be reported due to him for principal, interest, and costs, within *six months* after the chief clerk of the Judge to whose Court this cause is allowed, shall have made his certificate, at such time and place as shall be then appointed, the plaintiff shall reconvey the mortgaged premises to the defendant; but, in default of the defendant's paying to the plaintiff the principal money, interest, and costs, as aforesaid, by the time aforesaid, it is ordered and decreed that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of and in the said mortgaged premises.¹

It is to be observed, that the six months mentioned in the Order are *lunar* and not calendar months,² and that the plaintiff must, unless the time has been enlarged, attend either personally, or by his attorney duly authorized by power of attorney, at the time and place appointed, to receive the money reported due by him; and if, upon that occasion, the defendant does not attend to pay the money, the plaintiff's right to the estate will become absolute. He must, however, in order to complete his title, procure a final order for confirming it, otherwise the decree of foreclosure will not be pleadable.³

The same practice is also to be observed in the case of decrees for the redemption of a mortgage, which usually directs the plaintiff to pay the balances reported due from him within six months after the report; in default of which, the plaintiff's bill against the defendant is from thenceforth to stand dismissed out of Court, with costs;⁴ under this decree, although it directs that in default

¹ Seton on Decrees, 187. A decree in Chancery, that "defendant's equity of redemption be forever barred," will be considered as a formal decree of foreclosure. *Hunt v. Lewin*, 4 Stew. & Port. 138.

² Seton on Decrees, 140.

³ *Ibid.* 144. See *Whiting v. Bank of U. States*, 13 Peters, 6. A release of the equity of redemption after decree is equivalent to a final order. *Reynoldson v. Perkins*, 2 Amb. 564.

⁴ Seton on Decrees, 144. The decree upon a bill to redeem should fix the time within which the redemption is to take place; and should direct that the plaintiff's bill be dismissed with costs if the money is not paid within the time prescribed. *Waller v. Harris*, 7 Paige, 168.

In *Adams v. Brown*, 7 Cushing, 223, Bigelow J. said: "After the condition of

of payment by the plaintiff, his bill is to stand dismissed with costs, yet it will not be so dismissed without a final order, which, however, may be obtained as of course.¹ It may be observed in this place, that the practice of directing that, upon non-payment of money by the plaintiff, the bill shall be dismissed, is not confined to bills to redeem mortgages; thus, in *Lowther v. Andover*,² a similar order was made, in the case of a bill filed on behalf of a purchaser, for the specific performance of an agreement for the sale of an estate, and it was directed that a time and place for the payment of the principal money, interest, and costs, should be appointed; and it was directed that, in default of payment, the bill was to be dismissed with costs. In such cases, as well as in those above mentioned, a final order is necessary.³

It may be remarked that, in cases of decrees of foreclosure, the Court will, upon application, enlarge the time for payment of the money, and it seems that formerly it would do this without imposing any terms upon the defendant,⁴ but it afterwards became the practice to do it only upon the defendant consenting to a reference to compute interest upon the whole sum reported due for principal,

a mortgage is broken, and the mortgagee has entered for breach thereof, the legal estate of the mortgagor is determined, and has become vested in the mortgagee. All that the mortgagor has remaining is an equitable estate, that is, a right to redeem the premises, on paying what is due on the mortgage. When, therefore, he comes into a Court of Equity to regain his legal title and possession, he must pay what is actually due on the mortgage up to the time of redemption, before he can entitle himself to be restored to his legal rights." "The statute of Massachusetts requires the Court to ascertain what sum is due and payable at the time of the decree, not what was due and payable when the bill was filed; and the sum so ascertained is to be embraced in the decree for redemption." If the decree gives a time for redemption after its date, and the mortgagee is in possession receiving rents and profits during the time prescribed, a further account will be necessary in order to adjust the balance due at the end of the time by the decree for redemption. See *Mann v. Richardson*, 21 Pick. 355; *Stewart v. Clark*, 11 Metcalf, 384; *White v. Brown*, 2 Cushing, 412, 417.

¹ Seton on Decrees, 148. In this case the defendant will be entitled to taxed costs, though the cause was heard on bill and answer. A final dismissal of a bill to redeem is equivalent to a foreclosure; *Cholmley v. Countess of Oxford*, 2 Atk. 267; *Bishop of Winchester v. Paine*, 11 Ves. 199; but not a dismissal for want of prosecution; *Hansard v. Hardy*, 18 Ves. 460.

² 1 Bro. C. C. 397.

³ See *Gray v. Brignardello*, 1 Wallace U. S. 627.

⁴ *Ismoord v. Claypool*, 1 Cha. Rep. 262; even though it be an order absolute and enrolled; *Ford v. Wastell*, 2 Phil. 591.

interest, and costs :¹ now, however, the ordinary terms upon which the Court enlarges the time are the defendant's undertaking to pay the sum reported due for principal, interest, and costs, and the carrying on the account of subsequent interests and costs, including the costs of the application.²

On these terms the time will be enlarged for six months, and again for three months ;³ and in *Edwards v. Cunliffe*,⁴ a fourth order was made for enlarging the time, though the third was directed to be peremptory.

It may be noticed, that where exceptions were taken to the report of principal and interest due on the mortgage, application should be made to have the time for repayment of the principal and interest enlarged until the exceptions shall have been disposed of.⁵ Where, however, this was omitted, and pending the exceptions the time for payment elapsed, the plaintiff was not allowed to take a peremptory order to foreclose, but the Court referred it back to compute subsequent interest, and to appoint a new time of payment.⁶ And so also, if a mortgagee receive rents after the report, and before the day appointed for foreclosure, the Court will not make the decree absolute without a further reference and account, as a new day will be fixed for payment.⁷

Where a decree of foreclosure was appealed from, the Court refused a motion to suspend the execution of the decree till six months after the appeal should be heard, but directed that on the defendant's paying to the plaintiff the interest due from the time of filing his bill and his costs (upon the plaintiff's undertaking to repay the same, if the decree should be reversed), and consenting to the appointment of a receiver, the defendants might take six months from the time fixed by the report.⁸

Although the Court will, upon a bill for a foreclosure, allow the

¹ *Bickham v. Cross*, 2 Ves. 471 ; *Bennet v. Edwards*, 2 Vern. 392.

² *Seton on Decrees*, 142 ; *Edwards v. Cunliffe*, *ibid.* and 1 Mad. 287 ; *Monkhouse v. The Corporation of Bedford*, 17 Ves. 382 ; *Combe v. Stewart*, 13 Beav. 111 ; *Holford v. Yate*, 1 Kay & Johns. 677.

³ *Ibid.*

⁴ *Ubi supra.*

⁵ *Renvoize v. Cooper*, 1 S. & S. 365.

⁶ *Ibid.*

⁷ *Allen v. Foster*, 5 Beav. 592. See ante, 774, note ; *White v. Brown*, 2 Cushing, 412, 417.

⁸ *Monkhouse v. The Corporation of Bedford*, *ubi supra.*

defendant, upon application, to enlarge the time appointed for payment of the principal, interest, and costs, it will not do so upon a bill to redeem, for then the plaintiff comes into Court saying, "Here is the money, give me the estate"; but in a suit by a mortgagee to foreclose, the Court acts against a person unwilling to pay, and imposes upon him the terms that if he does not pay he shall lose his estate.¹

It has been before stated, that when a defendant makes a default at the hearing of a cause, "the decree shall be absolute in the first instance, without giving the defendant a day to show cause, and such decree shall have the same force and effect as if the same had been a decree *nisi* in the first instance, and afterwards made absolute in default of cause shown by the defendant."²

Since this Order the practice has been, upon a defendant making default, for the Court to hear the cause, and make such a decree as the plaintiff is upon the pleadings and evidence entitled to.³

SECTION II.

Of the Form of Decrees.

BEFORE we proceed to the consideration of the practice arising upon decrees when pronounced, it will not be out of place to make a few observations upon their form. Decrees, in general, consist of three parts:—1. The date and title; 2. The recitals; and 3. The ordering part; to which may sometimes be added, 4. The declaratory part, which, when made use of, generally precedes the ordering part.

1. The decree commences with a recital of the day of the month

¹ *Novosieki v. Wakefield*, 17 Ves. 417.

² 44th Order, August, 1841. A decree entered by default and enrolled was set aside on motion and notice to the plaintiff, on payment of costs. *Beekman v. Peck*, 3 John. Ch. 415; *Tripp v. Vincent*, 8 Paige, 176; *Carter v. Torrance*, 11 Georgia, 654; *Beach v. Shaw*, 4 Barb. Sup. C. 288.

In New Jersey, if a defendant does not appear at the hearing before the Chancellor, the cause having been regularly noticed for argument, he cannot appeal from a decree thus rendered in his absence. *Townsend v. Smith*, 1 Beasley (N. J.), 350. See *Dean v. Abel*, 1 Dickens, 287; *Stubbs v. Dunsany*, 10 Vesey, 30; *Sands v. Hildreth*, 12 John. 493; *Geltson v. Hoyt*, 13 John. 576.

³ *Hakewell v. Webber*, 9 Hare, 541.

and year when it was pronounced,¹ and of the names of the several parties to the cause; and, it is to be observed, that it is necessary that the parties, both plaintiff and defendant, should have the same titles in the decree as they have in the bill;² thus, if the plaintiff is described in the bill as executor or administrator, the decree must be accordingly.

2. Formerly decrees contained recitals of the pleadings in the cause.³ In like manner, a decree upon further directions, accord-

¹ See *Whitney v. Belden*, 4 Paige, 140; *Barclay v. Brown*, 7 Paige, 245. The caption of an order or decree, unless otherwise directed by the Court, should correspond with the time of the actual entry of the decree. *Barclay v. Brown*, *ubi supra*.

² *Curs. Canc.* 159.

³ *Seton on Decrees*, 5. Where a decree is rendered, which does not recite the facts upon which it is founded, or which the Court considered as proved, it is error apparent on the face of the decree, for which a bill of review will lie. *Burdoin v. Shelton*, 10 Yerger, 41. See *Peters v. Rosseter*, 1 Root, 273; *Bacon v. Childs*, 1 Root, 466; *Sampson v. Hunt*, 1 Root, 521; *Wernwag v. Brown*, 3 Blackf. 458. But it is not necessary to state in a decree that all the preliminary steps towards maturing the cause for hearing were taken; it being intended where the cause was set for hearing, that it was regularly done, unless the party attempting to impugn the decree show the contrary. *Quarrier v. Carter*, 4 Hen. & Munf. 242. If the facts found as the basis of a decree are substantially the same as those alleged in the bill, it is not a ground of error in the decree that they vary in some unimportant particulars. *Beers v. Botsford*, 13 Conn. 146. The practice of reciting the pleadings, &c. in decrees has been abolished in some of the States, and by the Rules in Equity of the Supreme Court of the United States. By Rule 86 of the Equity Rules of the Supreme Court of the United States, it is provided that "in drawing up decrees and orders, neither the bill nor answer, nor any other pleadings, nor any part thereof, nor the report of any Master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin in substance as follows: 'This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.'" [Here insert the decree or order.] See for New York, 1 Barb. Ch. Pr. 338; *Dey v. Dunham*, 2 John. Ch. 182. In Ohio a final decree need not set out a full statement of the facts on which the Chancellor's opinion is founded. *Ludlow v. Kidd*, 2 Ohio, 872; *Strader v. Byrd*, 7 Ohio, 184.

In *Clapp v. Thaxter*, 7 Gray, 384, 387, Thomas J. said: "In this country it is not ordinarily the practice to recite in the decree the bill, answer, or pleadings. But these with the decree constitute what may be considered the record of the cause." In *Dexter v. Arnold*, 5 Mason, 311, Story J. said: "In the Courts of the United States the decrees are usually general; they usually contain a mere reference to the antecedent proceedings without embodying them. But for the

ing to the old form, recited the ordering part of the original decree, and the Master's report made in pursuance of it.¹

Many attempts have been made by the Judges of the Court, from time to time, to shorten the length of decrees, occasioned by the introduction of the above recitals; and we find in the books several General Orders which have been promulgated with that view.²

Those Orders were not, however, found sufficient to insure the requisite brevity and conciseness in drawing up decrees. Accordingly, notwithstanding a somewhat adverse opinion given by the Commissioners appointed in 1826 to inquire into the practice of the Court, the stat. 3 & 4 Will. IV. c. 94, § 10, has enacted, "That, unless the Court shall otherwise specifically direct, no recitals shall be introduced in any decree or order of the Court; but the pleadings, petition, notice, report, evidence, affidavits, exhibits or other matters or documents, on which such decree shall be founded, shall be merely referred to."³

By the 27th of the Orders of 1833, made in pursuance of the above Act, it is directed that, "For the purpose of avoiding, as much as may be, expense and delay in the drawing of the decrees and orders of this Court, it is directed that (except in orders for special injunctions, in which the usual recitals shall be inserted as heretofore) neither the bill nor answers, nor any part thereof, be stated or recited in the original decree or order; and that, in orders made upon petitions, no part of the petition be stated or recited except the prayer; and, that the same principle of brevity be observed in all the orders of this Court made upon motion, so purpose of examining all errors of law, the bill, answers, and other proceedings are, in our practice, as much a part of the record before the Court, as the decree itself."

¹ Seton on Decrees, 9. A decree *pro confesso* against a non-resident should state the facts necessary to show that publication has been made agreeably to the rules of practice. *Keiffer v. Barney*, 31 Alabama, 192. It is not enough for a decree to recite that the defendant has been duly served with process, or regularly notified of the pendency of the suit, but the summons or advertisement should appear in the record. *Randall v. Songer*, 16 Ill. 27; *Hanson v. Patterson*, 17 Alabama, 738. But see *Craig v. Sebrell*, 9 Grattan (Va.), 131, where the contrary was held. It should appear affirmatively on the face of the decree on record, that the defendant had notice of the process. *Allen v. Blunt*, 1 Blatch. C. C. 480.

² See Beames's Ord. 381.

³ See *Hunt v. Ellison*, 32 Alabama, 173.

far as may be consistent with a statement, explaining the grounds upon which the order is made. And for the better understanding of the said Order, certain forms of decrees and orders, drawn pursuant thereto, are subjoined. And it is thereby directed, that such forms shall be observed in all cases, as nearly as may be."

By recent Orders, of November, 1855, all decrees are distinguished by the date of the year and the number of the cause in the books of the Clerks of Records and Writs.¹

Moreover, the Clerks of Records and Writs are to enter the date of every decree, order, report and certificate made in the cause and a reference to the date or folio of the Registrar's book.

It may be noticed here, that the practice of the Court of Chancery, with regard to stating in the decree the evidence read in the cause, is merely to state it generally,² without specifying the particular depositions which have been made use of. The entry is in the following words, viz.: "Whereupon, and upon debate of the matter, and hearing the will of J. P., date, &c., and the defendant's answers, and the proofs taken in this cause read, and what was alleged by the counsel on both sides, &c." This method of entering the evidence in the decree has been disapproved of, but, nevertheless, still continues.³ It is of material importance that the evidence should be entered in such a way as will at future times show precisely what has been received.⁴ In some very recent instances the date of filing affidavits is mentioned in the order or decree, and this practice would be convenient for reference in all cases.⁵

¹ See also 12th Order, April, 1853.

² See *Moore v. School Trustees*, 19 Ill. 83; *Trenchard v. Warner*, 18 Ill. 142; *Tatum v. Hines*, 15 Ark. 180.

³ *Seton on Decrees*, p. 6; *Brend v. Brend*, 1 Vern. 215; and see *Bonham v. Newcomb*, ib. 216. See, however, the observations of the Lord Chancellor in *McMahon v. Burchell*, 2 Phil. 138; *Watson v. Parker*, 2 Phil. 9; *Parker v. Morrell*, 2 Phil. 453.

⁴ See *Tatum v. Hines*, 15 Ark. 180. A decree must be founded on and sustained by both the allegations and the proofs in the cause; and it cannot be based on a fact not put in issue by the pleadings. *Carneal v. Banks*, 10 Wheat. 181; *Gregory v. Power*, 3 Litt. 339. It must conform to the allegations in the pleadings, as well as to the proofs in the cause. *Crocket v. Lee*, 7 Wheat. 522; *Ringgold v. Ringgold*, 1 Harr. & J. 11; *Pigg v. Corder*, 12 Leigh, 69; *Cloud v. Whiteman*, 2 Harring. 401; *Maury v. Mason*, 8 Porter, 211; *Smith v. Smith*, 1 Ired. Ch. 83; *Langdon v. Roane*, 6 Alabama, 518.

⁵ *Seton on Decrees*, p. 6, last edition.

3. The ordering or mandatory part of the decree contains the specific directions of the Court upon the matter before it. These directions must, it is obvious, depend upon the nature of the particular case which is the subject of the decree, and cannot, therefore, now be made the subject of discussion.¹ Certain regulations as to the mode of drawing up these directions in particular cases have, however, been laid down by the Orders of October 16, 1852.²

Where the decree is merely interlocutory, and directs an issue, it usually contains a reservation of the further matters to be decided, and generally, also, of the costs of the suit, till after the event of the issue shall be known. When it directs any accounts or inquiries to be taken or made in chambers, the cause is usually simply adjourned.

4. Where the suit seeks a declaration of the rights of the parties, the ordering part of the decree should be prefaced by such a declaration.³ Sometimes the Court has directed an insertion in the decree of the reasons for making the declaration, and of the grounds upon which it proceeds in making it.⁴ This, however, is

¹ A decree ordering the sale of property in the hands of heirs must specify and identify it. *Gayle v. Singleton*, 1 Stew. 566. A final decree for money must specify the sum, not leave it to be ascertained by a Commissioner. *Clark v. Ball*, 4 Dana, 16. A decree to account should specify the time from which the account is to be taken. *Cummins v. Adams*, 2 Irish Eq. 394. By the 73d Equity Rule of the U. States Courts, every decree for an account of the personal estate of a testator or intestate, shall contain a direction to the Master, to whom it is referred to take the same, to inquire and state to the Court what parts, if any, of such personal estate are outstanding or undisposed of, unless the Court shall otherwise direct.

² See Orders 8 to 13 inclusive. A decree may be so framed as to meet the case disclosed; but in its decree the Court must be consistent with itself. The Court may, without contradiction, pass a separate, a reciprocal, a direct, or an inverted decree, to meet the nature of the case. *Lingan v. Henderson*, 1 Bland, 275; *Hodges v. Mullikin*, ib. 507; *Owing's Case*, ib. 404. Where there are several defendants, and the subject in controversy is divisible, there may be a decree against all for a part; or, if they are disjunctively or separately liable, there may be a decree against each. *Lingan v. Henderson*, 1 Bland, 256. See *Hodges v. Mullikin*, ib. 507. Though specific legatees sue jointly, the decree ought to be several, in conformity to their respective rights. *Quarles v. Quarles*, 2 Munf. 321; *Elliott v. Pell*, 1 Paige, 263.

³ Except where the Court makes a merely declaratory decree under the 50th section of 15 & 16 Viet. c. 86; *Jenour v. Jenour*, 10 Ves. 568.

⁴ *Gordon v. Gordon*, 3 Swanst. 478; *Maynard v. Moseley*, ib. 653; *Onions v. Tyrer*, 1 P. Wms. 343; *Gibson v. Kinven*, 1 Vern. 67, n.; *Ex parte Earl of Ilchester*, 7 Ves. 373; *Attorney-General v. Clapham*, 4 De G., Mac. & Gor. 607; 10 Hare, 617.

not frequently done, though the utility of the practice has been recognized ;¹ and it seems that, as a declaration of the rights of the parties is the act of the Court, it ought not to be introduced where the decree is taken by the plaintiff upon the defendant's making default at the hearing.²

It may be mentioned, in this place, that when a decree is made by consent, it should be so stated in the decree.³

SECTION III.

Of Drawing up,⁴ Passing, and Entering Decrees.

WHEN the decree is pronounced by the Court, the minutes of it are taken down by the Registrar, and are delivered to the party having the carriage of the decree.⁵

It has of late been found convenient to prepare the copy of the minutes with a statement of the names of the parties appearing, and the evidence adduced in the form in which they are to be entered in the decree or order.⁶ The party entitled to the carriage of the decree should, immediately after it is pronounced, leave his papers at the Registrar's office to enable the Registrar to draw up the decree, and should duly proceed therein, otherwise the Registrar may draw it up at the instance of any other party and deliver it to him. The solicitors of the other parties should forthwith bespeak copies of the minutes, if they require them, and leave their briefs at the office. When the minutes are prepared, the solicitor having the carriage of the decree or order gives notice to attend the Registrar to settle the minutes.

¹ *Bax v. Whitbread*, 16 Ves. 24 ; *Gordon v. Gordon*, *ubi supra*.

² *Jennings v. Simpson*, 1 Keen, 404. A bill will not be sustained which seeks merely a declaration *of future rights*. *Cross v. De Valle*, 1 Wallace (U. S.) 1 ; *Langdale v. Briggs*, 39 Eng. Law & Eq. 194. See *Lorillard v. Coster*, 5 Paige, 172 ; *Hawley v. James*, 5 Paige, 442 ; *Grove v. Bastard*, 2 Phil. 621 ; *Davis v. Angel*, 8 Jur. N. S. 709 ; *S. C.* 8 Jur. N. S. 1024 ; *Bowers v. Smith*, 10 Paige, 200 ; *Baylies v. Payson*, 5 Allen, 473.

³ See *Seton on Decrees*, 375.

⁴ See *Rogers v. Rogers*, 2 Paige, 473 ; *Whitney v. Belden*, 4 Paige, 140.

⁵ In strictness, this ought always to be done ; see *Beames's Ord.* 270.

⁶ *Seton on Decrees*, 583.

If, upon perusing the minutes, it appears that anything is doubtfully expressed, or contrary to the plain sense and meaning of the Court, or that anything has been omitted in them which ought to have been inserted, and the Registrar refuses to make an alteration in them, an application must be made to the Court to vary the minutes. This application was made by petition, stating the specific matter to be added or altered;¹ but it is now usually by motion, of which notice must be given.² Sometimes the cause is, on the application of counsel, allowed to be put in the paper to be spoken to on the minutes. The Registrar should be informed of the application.

It is to be observed, that all applications to vary the minutes of decrees must be made to the Court by which the decree was pronounced, and that the Lord Chancellor has no power to alter a decree made by an inferior Judge, although he himself was that Judge; therefore, where a decree had been made by Lord Cottenham, when Master of the Rolls, an application to him, after he was Lord Chancellor, to vary the minutes of the decree, and which was not consented to, was refused.³

Formerly, by an Order of the Court,⁴ petitions to rectify minutes were directed to be presented within six days after the decree or order was pronounced, but of late years this rule has not been adhered to; and applications of this nature will in general be permitted, provided the decree remains in minutes.⁵ Strictly speaking, questions of importance ought not to be discussed upon appli-

¹ *Grey v. Dickenson*, 4 Mad. 464.

² *Harr.* 321; *Webber v. Hunt*, 1 Mad. 13; *Punderson v. Dixon*, 5 Mad. 121; *Clark v. Hall*, 7 Paige, 382; *Murray v. Blatchford*, 2 Wendell, 221; *Rogers v. Rogers*, 1 Paige, 188. A motion to rectify the minutes of a decree may be sustained at any time before the decree is recorded, *Gibson v. Crehore*, 5 Pick. 146; *Park v. Johnson*, 7 Allen, 381, 382, and may be argued, if the Court think proper. *Gibson v. Crehore*, 5 Pick. 146. But the Court may, in the exercise of its discretion, refuse to receive such motion, if there has been any improper and injurious delay in bringing it forward. *Ib.* By the 85th Equity Rule of the United States Courts, it is provided, that "clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrolment thereof, be corrected by order of the Court or a Judge thereof, upon petition, without the form or expense of a rehearing."

³ *Reece v. Reece*, 1 M. & C. 372.

⁴ *Beames's Ord.* 325.

⁵ 1 Turn. & V. 319. See, however, *Prince v. Howard*, 14 Beav. 208.

cations to vary minutes, but this rule is not always adhered to, and discussions of great moment have sometimes been permitted.¹ The proceedings upon petitions or motions of this description are the same as those upon other applications by the same means, and if an order to vary the minutes is pronounced, it must be passed and entered and served upon the adverse solicitor, but it is not usual to draw up this order upon the application, as the Registrar can amend the minutes as varied.²

The minutes being settled, the decree is transcribed from the minutes, and notice is then given to allow the Registrar to pass it. The decree is said to be passed when the Registrar has inscribed his initials in the margin, at the foot of the last page, as an authority to the clerk of entries to enter it in the Registrar's book.

The decree being passed, there is still a remaining form to be observed, before any proceeding can be had upon it, viz. the entry of it in the entering book at the Registrar's office;³ this is done by leaving the original decree with the entering clerk of the division under which the letter of the first-named plaintiff falls to be entered,⁴ and the decree appearing by the Registrar's signature to be passed, a true copy thereof is entered, of course, in the books. If the party in the possession of the original decree neglects or refuses to enter it, the office copy, regularly passed and signed, may be entered in its stead. The entry of a decree or order is supposed to be completed when it is left with the entering clerk;⁵ and, where it is intended to sue out a writ of *fieri facias* or *elegit* upon it, under the 1 & 2 Vict. c. 110,⁶ care must be taken that the day of the month and year, in which the same was left for entry, be marked upon it by the entering clerk in whose division the same may be, as it is provided by the 2d Order of the 10th May, 1839, that "Upon every such order hereafter to be entered, the entering clerk of this Court, in whose division the same may be, shall, at the request of the party leaving the same, mark the day of the month and year on which the same shall be so left for entry,⁷ and no

¹ *Perry v. Phillips*, 1 Ves. jr. 251 ; and see *Bootle v. Blundell*, 1 Mer. 202.

² *Turn. & V.* 318.

³ See *Whitney v. Belden*, 4 Paige, 140.

⁴ 30th Order, December, 1833.

⁵ See *Thompson v. Goulding*, 5 Allen, 84, 85.

⁶ See post, 1044.

⁷ In Massachusetts, every order and decree shall bear date as of the day when the same is actually entered by the clerk, and the date be noted upon the order or

writ of *fieri facias* or *elegit* shall be sued out upon any such order, unless the date of such entry shall be so marked thereon as aforesaid."

By the 30th Order of 1833, it is directed, "That all decrees and orders shall be entered within one week after the same shall be left for entry, and that all such entries shall be examined by one of the clerks of entries, and be marked with his initials, to denote such examination."

All proceedings under a decree or order, before it is entered, are voidable and irregular;¹ but an office copy of a decree, signed by the Registrar, is effective for every purpose of proceeding in the cause.

An order to enter a decree, *nunc pro tunc*, may be obtained as a matter of course, upon application by motion in Court, or by petition at the Rolls,² and, when entered and passed, must be left decree and upon the docket by the clerk at the time of entering the same. Genl. Sts. c. 113, § 16. But no decree can be said to be entered of record until it is formally drawn out and filed by the clerk. A mere order for a decree before it is extended in due form and in apt and technical language cannot be held to be a complete record of the judgment of the Court. Bigelow C. J., in *Thompson v. Goulding*, 5 Allen, 84, 85.

¹ *Tolsen v. Jervis*, 8 Beav. 364.

² Where one of the defendants dies after the argument of a cause, and before judgment, the decree will be entered so as to have relation back as of the day of the final hearing. *Campbell v. Mesier*, 4 John. Ch. 334; *Bank of U. States v. Weisiger*, 2 Peters, 481. Where the plaintiff died after the entry of an appeal from the decision of a Vice-Chancellor, and after the cause was ready for a hearing upon the appeal, but the fact of his death being unknown to the counsel, the cause was afterwards heard and decided by the Chancellor upon the appeal; it was held, that the decree upon the appeal might be entered *nunc pro tunc* as of a day previous to the death of the plaintiff and after the entering of the appeal. *Vroom v. Ditmas*, 5 Paige, 528. See *Wood v. Keyes*, 6 Paige, 478. The Court will direct a decree to be made up from the Registrar's notes, and entered *nunc pro tunc*, on the application of a third person. *Stoney v. Saunders*, 1 Hayes & J. 341; but not after a long lapse of time. *Witby v. Norton*, 4 Younge & Coll. 266. An enrolment made *nunc pro tunc* will have relation back to the time of the decree, and protect an intermediate sale. *Goelet v. Lansing*, 6 John. Ch. 75. But a decree cannot be entered *nunc pro tunc*, so as to affect by relation the rights of persons other than parties, or their immediate representatives, acquired before the decree was actually pronounced. *Dawson v. Scriven*, 1 Hill Ch. 177.

A decree *nunc pro tunc* is always admissible where a decree was ordered or intended to be entered, and was omitted to be entered only by the inadvertence of the Court; but a decree, which was not actually meant to be made in a final form, cannot be entered in that shape, *nunc pro tunc*, in order to give validity to

with the entering clerk, at the Reports office, when the decree is left to be entered.¹

It may be observed here, that orders to enter decrees *nunc pro tunc* will be made after a very long interval has elapsed from the time of pronouncing the decree; and that, even where the original decree has been lost, the Court has permitted it to be entered *nunc pro tunc*, from the office copy, after the lapse of twenty-three years.²

In *Jesson v. Brewer*,³ where the pleadings in the cause as well as the original decree (which was pronounced twenty-one years before the application) were lost, a paper, purporting to be a copy of the decree, was allowed to be entered as the decree, and enrolled, it appearing from the minute book of the Registrar that such a decree was pronounced at the time, and from a Master's report, that it had been acted upon.

When a party discharged his solicitor after an order was passed, but before it was entered, the solicitor was directed to produce the order to be entered, notwithstanding he had a lien then for his costs.⁴

It may be noticed in this place, that no decree or order of the Court will have the effect of a judgment at Law under the Act for abolishing Arrest on *Mesne Process*,⁵ "unless or until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the Court, and the title of the cause or matter in which such decree or order shall have been obtained or made, and the date of such decree or order, and the account of the debt, damages, costs, or moneys thereby recovered or ordered to be paid, shall be left with the senior Master of the Court of Common Pleas at Westminster, who is directed forthwith to enter the same particulars in a book, in alphabetical order, by the name of the person whose estate is intended to be affected by such decree or order, and is to be entitled for every such

an act done by a judicial officer under a supposition that the decree was final instead of interlocutory. *Gray v. Brignardello*, 1 Wallace (U. S.) 627.

¹ Hind. 432.

² *Lawrence v. Richmond*, 1 Jac. & W. 241; *Donne v. Lewis*, 11 Ves. 601.

³ 1 Dick. 371.

⁴ *Clifford v. Turner*, 2 De G. & Sm. 1.

⁵ 1 & 2 Vict. c. 110, s. 18.

entry to the sum of five shillings ; ¹ all persons are to be at liberty to search the same book, on payment of the sum of one shilling." And by 3 & 4 Vict. c. 82, s. 2, explained and amended by 18 & 19 Vict. c. 15, ss. 4 & 5, until such memorandum or minute had been left, *notice* of any judgment, decree, or order does not affect any purchaser, mortgagee, or creditor, either at Law or in Equity.

SECTION IV.

Enrolment of Decrees.

A DECREE does not, strictly speaking, become a record of the Court until it has been enrolled ; ² and, although the Court itself, after it has been duly passed and entered, treats it as a foundation for ulterior proceedings, it is not considered of a sufficiently permanent nature to entitle it in other Courts to the same attention that is paid by one Court of Record to the records of other Courts of the same nature.

In fact till a decree has been enrolled, and thereby become a record, it is liable to be altered by the Court itself upon a rehearing ; ³ whilst a decree, which has been enrolled, is not susceptible of

¹ 1 & 2 Vict. c. 110, s. 19.

² Where the decree is final as to any branch of the cause, or as to any of the parties thereto, it must be enrolled before a deed can be executed on a sale under the decree, and before an execution can be issued to enforce a performance of such decree. *Minthorne v. Tomkins*, 2 Paige, 102. This decision was under a rule in Chancery heretofore existing in New York. Decrees should be enrolled in all cases where a decree has been rendered, or an order of dismissal had, or any order in the nature of a decree, which determines the suit, whether such suit concerns real or only personal estate. Halst. Dig. 176. So, in all cases, where there are proceedings subsequent to a final decree, which go to alter such decree, the proceedings should be enrolled, but not where such proceedings do not alter the decree. Halst. Dig. 175.

In Massachusetts there is no proceeding in Equity such as the signing and enrolling of a decree in the English Court of Chancery. *Clapp v. Thaxter*, 7 Gray, 386. But a final decree formally drawn out and filed by the clerk, thereby becomes a record of the Court. *Thompson v. Goulding*, 5 Allen, 84, 85 ; *Clapp v. Thaxter*, 7 Gray, 386. In *Bates v. Delavan*, 5 Paige, 299, it was decided that the formal enrolment of a decree is not indispensable to its validity as evidence.

³ *Coleman v. Franklin*, 26 Georgia, 368.

alteration except in a Court of Appeal or by bill of review.¹ For this reason it is that a decree, which has not been enrolled, although it is in its nature a final decree, is considered merely as interlocutory, and cannot be pleaded in bar to another suit for the same matter.² The advantage, therefore, to be obtained by the enrollment of a decree is to prevent its being the subject of a rehearing, and to enable the party benefited by it to plead it in bar to any new bill which may be filed against him for any of the matters embraced by the bill upon which the decree is founded.³

¹ *Clapp v. Thaxter*, 7 Gray, 385 ; *Story Eq. Pl.* § 403 ; *Thompson v. Goulding*, 5 Allen, 82. "The well-settled rule of Chancery practice is, that, after a decree has been enrolled, that is, after it has become matter of record, there can be no rehearing, either on motion or petition." Bigelow C. J., in *Thompson v. Goulding*, 5 Allen, 82 ; *McMicken v. Perin*, 18 Howard (U. S.) 507. A decree obtained by fraud, can be set aside only by original bill. *Caldwell v. Giles*, Riley Ch. 120 ; *Burch v. Scott*, 1 Bland, 112 ; *Wright v. Miller*, 1 Sandf. Ch. 103 ; *Davoue v. Fanning*, 4 John. Ch. 199 ; *Sanford v. Head*, 5 Cal. 297.

² Ante, 685 ; *Clapp v. Thaxter*, 7 Gray, 385, 386.

³ *Story Eq. Pl.* § 790 ; *Mitf. Eq. Pl. by Jeremy*, 237 ; *Neafie v. Neafie*, 7 John. Ch. 1. Although a decree in a former suit to which the plaintiff and defendant were parties cannot be pleaded in bar until it is signed and enrolled, it may be insisted on by way of answer. *Davoue v. Fanning*, 4 John. Ch. 199. It will not be allowed at the hearing, unless set up in the answer, or, if enrolled, pleaded. *Lyon v. Tallmadge*, 14 John. 501.

In *Clapp v. Thaxter*, 7 Gray, 384, 386, Thomas J., said : "There is no proceeding under our practice, such as the signing and enrolling of a decree in the English Court of Chancery. But that which is equivalent thereto is the entry of a final decree and judgment thereon as of the last day of the term, or, by the express order of the Court, at an earlier day ; or when the cause has been continued *nisi* from any law term, a judgment entered by order of the Court as of the then last term of the Court in the county where the action is pending. Genl. Sts. c. 133, § 1, c. 112, § 31 ; *Herring v. Polley*, 8 Mass. 113. Though judgments, in Courts of Law, and final decrees in Equity are, in this country, matters of record, they are deemed to be recorded as of the term of the Court in which they are passed, though not then actually spread upon the record. In substance and effect they are deemed to be enrolled as of that term. *Whiting v. Bank of U. States*, 13 Peters (U. S.) 6 ; *Dexter v. Arnold*, 5 Mason, 303 ; *Story Eq. Pl.* § 403 ;" *Thompson v. Goulding*, 5 Allen, 83 ; *Simms v. Thompson*, 1 Dev. Ch. 197 ; *McMicken v. Perin*, 18 Howard (U. S.) 507 ; *Allen v. Barksdale*, 1 Head (Tenn.), 238 ; *Newland v. Glenn*, 2 Maryland Ch. Decis. 368 ; *Husley v. Robinson*, 16 Alabama, 793.

But in Massachusetts, by statute 1859, c. 237, substantially re-enacted in Genl. Sts. c. 113, a system was established based upon the theory, that the Court of Chancery is always open, and capable of transacting business without the formality of a stated term or session. Under this system full power was conferred upon the Supreme Judicial Court and upon the Justices thereof, to make and enter all decrees in Equity, either interlocutory or final, at any time, irrespective of

It will be convenient, in the first place, to set out the following General Orders concerning enrolments, issued on the 7th of August, 1852:—

II. That all decrees and orders, and all dismissions, pronounced or made in any cause, claim or matter in this Court, which shall be enrolled, shall be so enrolled within six calendar months after the same shall be so pronounced or made respectively, and not at any time after without special leave of the Court, such leave to be obtained in manner next hereinafter mentioned.¹

By a General Order of the Court, all decrees and dismissions, pronounced upon hearing the cause, were to be drawn up, signed and enrolled before the first day after the next Michaelmas or Easter Term after the same should have been so pronounced respectively, and not at any time after without special leave of the Court.² This leave was granted at any time, and, in order to obtain it, a motion must have been made or petition presented at the Rolls, praying that the decree might be enrolled *nunc pro tunc*, upon which an order was made as a matter of course.

The effect of the above Order will be to abolish the practice of enrolling decrees *nunc pro tunc*. The following Order prescribes the manner in which an enrolment is to be obtained, when six calendar months have expired from the time when the decree was pronounced or made:—

III. In case any party is desirous to enrol a decree, or order or dismissal, after the expiration of six calendar months from the time the same shall have been made, he shall obtain an order for that purpose, and which order, unless made by consent of the adverse party, or on motion and notice to all the parties, shall be a conditional order in the first instance, but shall become absolute

the regular terms established by law for the transaction of business on the common law side of the Court; and decrees, so entered, must be operative from the time when they are entered of record. They then become the definitive judgment of the Court, — a record in a strict sense, by which the rights of the parties in controversy are finally adjudged. To a decree so entered, the fiction of law by which a term of a Court is held to be an entirety, or one session, so that all judgments, unless otherwise specially ordered, are deemed to be rendered as of the last day of the term, and until the final adjournment to be within the control of the Court, does not apply. Per Bigelow C. J., in *Thompson v. Goulding*, 5 Allen, 84.

¹ The application under this and the following Order must be made in the first instance to the Court to which the cause is attached; *Butchardt v. Dresser*, 1 Kay, Appx. XXVII.

² Beames's Ord. 206.

without further order, unless cause is shown against it within twenty-eight days after service of the order.¹

We shall see hereafter,² that a certificate is necessary previous to enrolment, that everything has been rightly done, consequently an affidavit of service of the conditional order will be required to prove that the twenty-eight days "after service of the order" have expired. The next Order provides a limitation to the period within which a caveat must be prosecuted.³

IV. That where a caveat is entered with the proper officer to stay the signing of the docket of the enrolment of any decree, order or dismissal, such caveat shall be prosecuted with effect within twenty-eight days after the docket of such decree, order or dismissal shall be left to be signed with the proper officer by the party who entered the same, otherwise such caveat shall be of no force; and the docket of such decree, order or dismissal may, immediately after the expiration of the said twenty-eight days, be presented to be signed as if no such caveat had been entered.

V. That no enrolment of any decree, order or dismissal shall be allowed after the expiration of five years from the date thereof.

VI. That the Lord Chancellor, either sitting alone or with the Lords Justices, or either of them, shall be at liberty, where it shall appear to him under the peculiar circumstances of the case to be just and expedient, to enlarge the periods hereinbefore appointed for a rehearing, or an appeal, or for an enrolment.

From the language of this Order, it is clear that the period for enrolment will not be enlarged, unless it is proved by the party making the application that there are peculiar circumstances rendering it just and expedient.

Whatever difference of opinion may previously have been entertained on this subject, it seems clear that now no appeal to the House of Lords can take place, unless the decree appealed against has been enrolled.⁴

¹ *Webb v. London and Portsmouth Railway Company*, 10 Hare, Appx. XVI.; *Sherwin v. Shakespeare*, 18 Beav. 527.

² Post, p. 1034.

³ See post, p. 1037, as to the entry of caveats.

⁴ *Andrews v. Walton*, 8 Cl. & Fin. 457, and 6 Jur. 519; *Broadhurst v. Tunnicliff*, 9 Cl. & Fin. 71. Decrees of a single Justice of the Supreme Judicial Court of Massachusetts, whether final or interlocutory, may be appealed from; and there is no proceeding under the practice in that State, such as the signing and enrolling of a decree in the English Court of Chancery. Genl. Sts. c. 113, § 8, 10; *Clapp v. Thaxter*, 7 Gray, 386. But that which is equivalent thereto is the entry of a final decree and judgment thereon. 7 Gray, 386.

With respect to the orders or decrees that are capable of enrolment, by the Act to abolish the Office of Master,¹ "All orders of the Master of the Rolls or of any Vice-Chancellor, made by him at chambers, shall have the force and effect of orders of the Court of Chancery,² and such orders may be signed and enrolled in the same manner."

In the case of *M'Gregor v. Topham*,³ Sir J. Wigram, V. C., held, that an order refusing a motion for a new trial of an issue *devisavit vel non* might be enrolled at the application of either party. But mere interlocutory orders, made upon motion or petition, which do not decide any of the merits of the cause, and only relate to the proceedings in it, cannot be the subject of an enrolment.⁴ And it is to be recollected that decrees which, although final in their nature, require a further order of the Court to complete them, such as decrees to foreclose or redeem mortgages or decrees *nisi*, must be perfected before they can be enrolled. Orders under the Winding-up Acts may be enrolled.⁵

A decree may be enrolled by a defendant as well as by a plaintiff, and, subject to the above Orders, it may be done at any time, and notwithstanding an abatement of the suit. Thus, where a decree was made in a cause and cross cause, but was not signed or enrolled till after the death of a party who was plaintiff in the first cause and a defendant in the cross cause, upon a petition being presented to vacate the enrolment, on the ground of its having been made pending the abatement, it was referred to a Master to see whether the signing and enrolling had been irregular, who certified his opinion to be that the decree was not properly signed and enrolled; but Lord Hardwicke, upon exceptions to the Master's

¹ 15 & 16 Vict. c. 80, § 15.

² In Massachusetts, decrees, interlocutory or final, may be made by a single Justice of the Supreme Judicial Court, subject, however, in either case, to appeal to the full Court. Genl. Sts. c. 113, § 6, 8, 10.

In Vermont, the Supreme Court cannot make a final decree in a suit in chancery, but must remand the case to the Court of Chancery, to be there proceeded with, according to the mandate of the Supreme Court. *Downer v. Dana*, 22 Vermont, 337. In this State each Judge of the Supreme Court is a Chancellor in his circuit.

³ 4 Hare, 162.

⁴ It seems doubtful how far this is true in the case of a motion refusing an information; *Attorney-General v. Mayor, &c. of Wigan*, 5 De G., Mac. & Gor. 52.

⁵ *In re Direct London Railway Company*, 1 M. & S. 454. In the case of foreclosure, the Court may however enlarge the time, notwithstanding the enrolment of the decree; *Ford v. Wastell*, 2 Phil. 591; ante, p. 1017.

certificate, entertained a different opinion and allowed the exception.¹

The solicitor of the person enrolling the decree draws up the form of the decree for enrolment,² and in the preparation of this form regard must now be had to the 1st Order of the 17th of March, 1843, which directs, "That for the purpose of diminishing expense in the enrolment of decrees and orders, no part of the statements or allegations contained in any bill, answer, petition, affidavit or report shall be recited or stated in any such enrolment, but that it shall be sufficient to state in such enrolment the filing of the bill or petition, or service of the notice of motion, the names of the parties thereto, together with the prayer of the bill or petition, or notice of motion, the filing of the several answers and other pleadings or proceedings and reports, whether confirmed or not, and the short purport or effect of any decree or order made, had, put in or taken before the date of the decree or order enrolled and leading thereto."

The decree so drawn up is called the Docket of Enrolment, and after it has been prepared by the solicitor, a certificate that it is correct must be obtained from the Clerk of Records and Writs; for the 2d Order of the 17th of March, 1843, directs "That no decree or order shall be enrolled until the Clerk of Records and Writs, in whose division the cause may be, shall have inspected the docket of such enrolment, and shall have certified thereon that the statement of the pleadings, orders, reports and proceedings therein contained is correct,³ and that for such inspection and certificate the Clerk of Records and Writs shall be entitled to receive the sum of three pounds,⁴ to be by him paid into the suitors' fee fund."

After this certificate has been obtained, the next process is to present the docket for signature.⁵ If the decree was pronounced

¹ *Slabordo v. Duchess of Buckingham*, Amb. 586.

² In Mississippi, according to the practice in Equity, a decree is usually drawn out by counsel, and submitted to the Chancellor for his signature. When it is signed and placed upon the records of the Court, it is then to be considered as enrolled. *Sagory v. Bayless*, 13 S. & M. 153.

³ See ante, p. 1031.

⁴ Schedule to Orders of 25th October, 1852.

⁵ "There is no proceeding, under our practice, such as the signing and enrolling of a decree in the English Court of Chancery." Thomas J., in *Clapp v. Thaxter*, 7 Gray, 386. See *Sagory v. Bayless*, 13 S. & M. 153, cited in note 2, above.

by the Lord Chancellor, or one of the Vice-Chancellors, it may be presented to the Chancellor at once ;¹ but if by the Master of the Rolls, his signature must be procured before it is presented to the Lord Chancellor.

The docket, thus authenticated by the proper officer, is left, if the cause has been heard by the Lord Chancellor himself or by a Vice-Chancellor, with the Clerk of Record and Writs,² which officer will procure the Lord Chancellor's signature to it. If the cause has been heard by the Master of the Rolls, the docket is first left with the Secretary of the Master of the Rolls for the signature of the Master of the Rolls, after which it is taken to the Lord Chancellor for his Lordship's signature. And it is to be observed, that, whether the cause was heard before the Lord Chancellor, or by the Master of the Rolls,³ or a Vice-Chancellor,⁴ it is the Lord Chancellor's decree, and must be signed by him before it is enrolled.⁵

The docket having been signed by the Lord Chancellor, the day and year when it was signed must be written at the foot of the docket,⁶ near the signature of the Lord Chancellor, after which the Record and Writ Clerk enrolling the decree engrosses an exact copy thereof upon parchment rolls, and carefully examines it with the docket, which, together with the parchment rolls, is carried into the record room of the Record and Writ Clerks' Office, and deposited with the Record Keeper for safe custody. The enrolment is then complete, and a decree thus enrolled is pleadable, and

¹ *M'Dermott v. Kealey*, 1 Ph. 267.

² The office of Secretary of Decrees was abolished by 15 & 16 Vict. c. 87, § 23, and the duties transferred to the Record and Writ Clerks' Office.

³ 3 Geo. II. c. 30.

⁴ 53 Geo. III. c. 24.

⁵ In Texas it is not necessary that a decree of the District Court should have the signature of the presiding Judge. *Cannon v. Hemphill*, 7 Texas, 184.

⁶ The docket of enrolment is dated at the foot by the Record and Writ Clerk before the signature of the Lord Chancellor is attached. When the docket is signed it is returned to the solicitor for the party enrolling, and by him engrossed, omitting the date and signature of the Lord Chancellor and the certificate of the Clerk of Records and Writs. It is then deposited with the parchment rolls at the Rolls Yard.

In Massachusetts, every order and decree shall bear date as of the day when the same is actually entered by the Clerk, and the date be noted upon the order or decree and upon the docket by the Clerk at the time of entering the same. Genl. Sts. c. 113, § 16.

cannot be reversed but by appeal to the House of Lords, or by bill of review.¹

As the effect of enrolling a decree is to render it final, and to deprive the party against whom it is pronounced of all opportunity of having it corrected by a rehearing in the Court itself, such party, if he is dissatisfied with the decision and wishes to have it reheard, either before the Judge who pronounced it or before the Lord Chancellor, by way of appeal, must take the proper precautions to prevent the enrolment. One course by which the enrolment may be prevented, is by the opposite party taking the necessary steps for a rehearing; for if previously to the enrolment being completed, service of an order, setting down an appeal, be served upon the party proceeding to enroll, then an enrolment subsequent to such service will be irregular;² but neither the mere presentation of a petition of appeal, nor notice of the order having been made, nor even obtaining the order to set it down, will be sufficient, unless service of the order be effected upon the other side.³

To prevent, therefore, the danger of the enrolment being completed before service of an order of appeal can be effected, it is permitted to a party objecting to a decision, and desirous of having it reheard, to enter a *caveat* against the enrolment with the proper officer.⁴

¹ Hind, 444; Clapp v. Thaxter, 7 Gray, 385, 386. See per Thomas J., in Clapp v. Thaxter, 7 Gray, 386; Bigelow C. J., in Thompson v. Goulding, 5 Allen, 82; Simms v. Thompson, 1 Dev. Ch. 197.

In Maryland, a decree is to be taken and considered as enrolled, when it is signed by the Chancellor, and filed by the Register, and the term during which it was made has elapsed. Burch v. Scott, 1 Gill & John. 393; Pfeltz v. Pfeltz, 1 Maryland Ch. Dec. 455.

² Where to prevent an appeal, a decree has been enrolled in bad faith, the enrolment will be set aside. Wickenden v. Rayson, 35 Eng. Law & Eq. 252.

³ Dearman v. Wych, 4 M. & C. 550; Groom v. Stinton, 2 Phil. 384.

⁴ This difficulty is avoided in Massachusetts by the provisions of the statute, that, "From final decrees made by a single Justice of the Supreme Judicial Court, any party aggrieved may, within thirty days after the entry thereof, claim an appeal, to be entered on the Clerk's docket; and thereupon all proceedings under such decree shall be stayed, and such appeal be thereupon pending before the full Court," &c. And "no process for the execution of a final decree, made by such single Justice, shall issue until after the lapse of thirty days from the date of the entry thereof, unless all parties, against whom such decree is made, waive an appeal by an entry on the Clerk's docket, or by a writing filed in the cause." Genl. Sts. c. 113, § 8, 17.

In New Jersey no final decree shall be enrolled by the Clerk, nor shall the

A *caveat* is entered at the Record and Writ Clerks' Office, or with the Master of the Rolls' Secretary, according as the decree is made by the Lord Chancellor, or a Vice-Chancellor, or by the Master of the Rolls,¹ upon a note, in the following form, being left with him : —

“ IN CHANCERY.

John Doe plaintiff,

and

William Styles . . defendant.

Decree made by his Lordship, [or by his Honor the Vice-Chancellor, or Master of the Rolls,] dated the 31st day of January, 1839.

Enter a Caveat against enrolling this Decree.

A. B., Clerk.

28th of September, 1839.”

The effect of this *caveat* is to prevent the signing of the decree previous to its enrolment for twenty-eight days, to be accounted from the time of the docket being left to be signed with the proper officer by the party entering the same; but if the *caveat* be not prosecuted with effect within that period, the docket may be signed as if no *caveat* had been entered.² These twenty-eight days must be clear days;³ and it seems that service of notice, of the docket having been presented, on the solicitor, is good service.⁴ Notice of the presentation of the docket for signature should be given by the respective officer with whom it is left.⁵

No period appears to be limited by the practice of the Court enrolment be signed by the Chancellor, nor any process be issued thereon, until the expiration of ten days after pronouncing the same, without the special order of the Court therefor. Chancery Rule, XVIII. If a petition for a rehearing shall be presented to the Chancellor within ten days after pronouncing any final decree, and a *caveat* against enrolling and signing the same shall be filed with the Clerk of the Court, such final decree shall not be enrolled and signed, nor any process issued thereon, until the application shall be finally disposed of. Chancery Rule (N. J.) XIX. § 3.

¹ See ante, p. 1035, note (2).

² 4th Order of 7th August, 1852, ante, p. 1032.

³ Robinson v. Newdick, 3 Mer. 13.

⁴ Ibid.

⁵ Burnet v. Theobald, 1 P. Wms. 610.

within which a *caveat* may be entered ; but a party dissatisfied with the decision of the Court should lose no time, after the decree has been passed and entered, in entering his *caveat* to prevent the other party from enrolling the decree. The *caveat*, however, will be in time if entered at any time before the docket has been left at the Record and Writ Clerks' Office for the signature of the Lord Chancellor. It is to be observed, that it is the delivery of the docket which completes the enrolment ; and that a *caveat*, entered after that has taken place, will be useless, even though the signature should not be actually affixed at the time of its entry. Thus, where the docket had been delivered by the Bag-bearer into the hands of the Lord Chancellor's Secretary of Decrees, for the purpose of being submitted to the Lord Chancellor for signature, and the Secretary had despatched it to Brighton, where his Lordship was residing, and, in the evening of the same day, and before the signature had been actually affixed, a *caveat* was tendered at the office, but refused, as coming too late ; Lord Lyndhurst, upon a motion to vacate the enrolment, was of opinion that the *caveat* was not in time.¹

If any irregularity has occurred in the enrolment of a decree or order, or in the proceedings to accomplish that object, the Court will, upon application by motion,² order it to be vacated ; thus, in the case last referred to, where the enrolment was completed after a *caveat* and the presentation of a petition of appeal, but before it was signed or the order for a rehearing made, the Court directed it to be vacated.

The enrolment was vacated when due notice of passing and entering the decree had not been given, under circumstances which amounted to surprise.³

It seems, also, that where the case has not been heard upon its merits, the Court will exercise a discretionary power of vacating an enrolment, and of giving the party an opportunity of having the merits of his case discussed ; thus, where a decree of dismissal was made by default, owing to the neglect of the plaintiff's solicitor in providing counsel to attend at the hearing.⁴ So in *Benson v.*

¹ *Barnes v. Wilson*, 1 R. & M. 486.

² Or petition, see *Pickett v. Loggon*, 5 Ves. 702.

³ *Hargrave v. Hargrave*, 3 Mac. & G. 348 ; *Stewart v. Beard*, 3 Maryland Ch. Decis. 227 ; *Barry v. Barry*, 1 Maryland Ch. Decis. 20.

⁴ *Robson v. Cranwel*, cited 1 Ves. 205. See *Millspaugh v. McBride*, 7 Paige,

Vernon,¹ where a bill had been taken *pro confesso*, for want of an answer, and it was proved that the defendant was in an unsound state of mind, and had omitted, from that circumstance, to put in an answer, the House of Lords ordered the enrolment of the decree to be vacated. The same principle was also acted upon by Lord Hardwicke, in *Kemp v. Squire*,² who said that the above cases proved it to be discretionary in the Court (he did not mean it arbitrarily so) to exercise the power if it sees fit. In *Pickett v. Loggon*,³ however, the Court refused to act upon this discretion, and it is to be observed, that in all those cases where it has been exercised, the merits of the cause had not been discussed before the decree was pronounced; and that, where such has been the case, the Court has refused to exercise the discretionary power before alluded to,⁴ unless there has been something in the nature of a surprise upon the party affected, as in the anonymous case which has been before referred to,⁵ or in *Stevens v. Guppy*,⁶ where the enrolment of a decree was set aside, because made a few days after a conversation had taken place between the solicitor for the plaintiff and the solicitor for the defendant, in which the former had informed the latter that a petition for a rehearing was preparing, to which the latter answered by desiring that no time might

509; *Tripp v. Vincent*, 8 Paige, 176; *Robertson v. Miller*, 2 Green Ch. 451, 454; *Parker v. Grant*, 1 John. Ch. 630. In *Robertson v. Miller*, 2 Green Ch. 453, 454, the Chancellor said:—"There is a clear distinction between a decree *nisi* for default, according to the English practice, and a final decree after an order that the bill be taken *pro confesso*, and reference to a Master to take an account, according to our practice. Applications to open the one are treated with indulgence, attempts to set aside the other are more strictly scrutinized." "The whole current of authorities goes to show that there is a difference between decrees by default, orders that the bill be taken *pro confesso*, and actual decrees *pro confesso*. The last is considered, when compared with the others, as sacred, and to be disturbed only for weighty reasons." See *Lansing v. McPherson*, 3 John. Ch. 424; 1 Hoff. Ch. Pr. 551; *Wooster v. Woodhull*, 1 John. Ch. 541; *Knight v. Young*, 2 Ves. & B. 184.

¹ Cited *ibid.* 206.

² 1 Ves. 205.

³ 5 Ves. 702.

⁴ *Charman v. Charman*, 16 Ves. 115.

⁵ 1 Ves. 326.

⁶ 1 Turn. & R. 178; see also *Parker v. Dee*, 2 Cha. Ca. 200; 1 Rep. temp. Finch, 123; 3 Swanst. 529; Anon. 1 Vern. 131; *Enraght v. Fitzgerald*, 1 Dr. & W. 72.

be lost in preparing it.¹ It appears that the Vice-Chancellors have no jurisdiction to vacate an enrolment.²

It appears that in order to establish a case of surprise, there must be a certain degree of *mala fides* on the part of the party enrolling, which may have misled the party complaining; therefore it was held, by Lord Brougham, in *Balguy v. Chorley*,³ that the mere circumstance of its having been intimated, on the part of the defendant, to the plaintiff's solicitor, that it was the intention of the defendant to appeal forthwith, and of the plaintiff's solicitor saying in answer, that he was open to any fair offer of arrangement to prevent the necessity of an appeal, did not amount to such a surprise as will induce the Court to vacate the enrolment. This is in accordance with what was laid down by Lord Lyndhurst, in *Barnes v. Wilson*,⁴ where his Lordship held, that a party was not bound to communicate his intention to enroll a decree to his adversary, because the latter informs him of his intention to appeal against it.⁵

After a decree has been enrolled, it can only be altered on a bill of review,⁶ or by an appeal to the House of Lords; and this, though the decree has been enrolled by one of several defendants.⁷ In some cases, however, the Court, as we shall see in the next section, will permit clerical errors and miscastings to be rectified, upon motion, soon after enrolment.

¹ Applications to open decrees address themselves to the sound discretion of the Court. They should be listened to generally with great caution, and should not be granted when the result would be injurious to the plaintiff who has conformed himself to the law of the Court. A final decree will not be opened, on the application of the defendant, five and a half years after the decree was made, and four and a half years after it came to the knowledge of the defendant, upon the ground of the pecuniary inability of the defendant to make the application at an earlier day. *Robertson v. Miller*, 2 Green Ch. 451. Where the facts are all before the Court, application to vacate a decree or set aside an order may be made upon motion merely. It is not necessary to file a petition. *Collins v. Taylor*, 3 Green Ch. 163.

² *Ford v. Wastell*, 11 Jur. 537.

³ 1 M. & K. 640.

⁴ 1 R. & M. 486.

⁵ But where to prevent an appeal, a decree has been enrolled, in bad faith, the enrolment will be set aside. *Wickenden v. Rayson*, 35 Eng. Law and Eq. 252.

⁶ *Clapp v. Thaxter*, 7 Gray, 386; *Pfeltz v. Pfeltz*, 1 Maryland Ch. Dec. 455.

⁷ *Gore v. Pardon*, 1 Sch. & Lef. 234.

From the case of *M'Dermott v. Kealey*,¹ it appears that the enrolment of an order subsequent to a decree, reciting the decree, is not *per se* an enrolment of the decree, although such was not then the opinion of the Clerks of Records and Writs; but the enrolment of an order subsequent to a decree will prevent a rehearing of the decree, if the variations sought to be made in the decree are inconsistent with the enrolled order. The enrolment, however, of a subsequent order, though not an enrolment of the decree itself, may prevent a rehearing of the decree, when the latter cannot be altered so consistently with the enrolled order.²

SECTION V.

Of Rectifying Decrees.

WE have seen before,³ that as long as the decree remains in the shape of minutes, that is, till it has been passed and signed by the Registrar, it may be rectified upon application to the Court, by petition or motion, or by having it put into the cause paper, "*to be spoken to*," and that even important matters may be brought before the Court upon an application to vary minutes; but after a decree has been passed and entered, the Court will not entertain any application to vary it, unless in respect of matters which are quite of course. The proper method of having a decree rectified in other matters, is by applying to have the cause reheard.⁴

In cases, however, in which a clerical error has crept into the decree, or in which some ordinary direction has been omitted, the Court will entertain applications to rectify it, even though it has been passed and entered;⁵ and when the decree omitted a direction that was then of course, it was corrected by the insertion of

¹ 1 Ph. 267.

² S. C. Ibid.

³ Ante, p. 1024.

⁴ 2 Harr. 322; see post, rehearings and appeals. *Gardner v. Dering*, 2 Edw. Ch. 131; *Bennett v. Winter*, 2 John. Ch. 205; *Clark v. Hall*, 7 Paige, 382; *Hendrick v. Robinson*, 2 John. Ch. 484; 2 Smith Ch. Pr. (2d Am. ed.) 15, note (b) and cases cited.

⁵ See *Lawrence v. Cornell*, 4 John. Ch. 546; *Thompson v. Goulding*, 5 Allen, 82; *Peaslee v. Barrey*, 1 Chip. 331; *Gibson v. Crehore*, 5 Pick. 146.

that direction.¹ So where a decree, in a creditor's suit, omitted the usual direction to take an account of the personal estate, it was ordered to be inserted.²

It is, nevertheless, to be observed, that it is a principle of the Court, that no alteration can be made in a decree on motion without a rehearing, except in a matter of clerical error or of form, or where the matter to be inserted is clearly consequential on the directions already given.³ Upon this ground, where the decree directed a commission to ascertain the boundaries of prebendal lands, a motion, that the decree might be extended to copyhold as well as to freehold lands, which was opposed, was refused.⁴ So where an ejectment was ordered to be brought, without restraining the defendant from setting up an outstanding term, the introduction of such a restraint was not permitted.⁵ In *Colman v. Sarell*,⁶ Lord Thurlow would not allow a decree to be varied, by giving costs to a defendant who was a mere trustee, and, as such, would have been entitled to them if they had been asked for at the hearing. And, in *Brookfield v. Bradley*,⁷ Sir John Leach declined to correct a decree, in which the error was apparent, because the alteration proposed would require new directions upon the corrected part.⁸

¹ *Wallis v. Thomas*, 7 Ves. 292.

² *Pickard v. Mattheson*, 7 Ves. 293; see also, *Newhouse v. Mitford*, 12 Ves. 456; *Lane v. Hobbs*, ib. 458; *Skrymsher v. Northcote*, 1 Swanst. 573, n.; *Tomlins v. Palk*, 1 Russ. 475; *Hawker v. Buncombe*, 2 Mad. 391. So, a decree will be amended, where, through inadvertence, costs have been given by it, to a party in the case, where he was not entitled to them. *Murray v. Blatchford*, 2 Wendell, 221. A decree may also be amended or corrected on motion or petition, not only as to mere clerical errors, but by the insertion of any provision or direction, which would have been inserted as a matter of course, if the same had been asked for at the hearing, as a necessary or proper clause to carry into effect the decision of the Court. *Clark v. Hall*, 7 Paige, 382. See *Jenkins v. Eldredge*, 1 Wood. & Minot, 63.

³ Although the Chancellor has no authority to set aside a decree final in its nature, in respect to the subject-matter of it, on account of any error in fact or law, yet he may suspend the execution of it for matter arising subsequently, which would render its execution oppressive. *Spann v. Spann*, 2 Hill Ch. 152.

⁴ *Willis v. Parkinson*, 3 Swanst. 233.

⁵ *Brackenbury v. Brackenbury*, 2 Jac. & W. 391.

⁶ 2 Cox, 206.

⁷ 2 S. & S. 64.

⁸ An order or decree, *by consent*, cannot be varied or modified in a material part, without the assent of both parties to the same. But the Court, upon the

It is to be noticed that, in the two last cases, the application was made by petition, but in *Wallis v. Thomas*, *Pickard v. Mattheson*, and others which have been referred to, the application was by motion upon notice.¹ It seems, however, to be doubtful whether in all cases where such an alteration in a decree is required, the application should not be made by petition, for, by the 45th of the Orders of 1828, it is provided, "That clerical mistakes in decrees, or decretal orders, arising from any accidental slip or omission, may, at any time before enrolment, be corrected *upon petition* without the expense of a rehearing."²

According to Lord Cottenham, in *Whitehead v. North*,³ this Order only enables the Court to supply something which would make an existing direction complete; but it does not contemplate the insertion of a new direction.

Proceedings under this Order must be by petition, but in some cases an omission has been supplied by a separate supplemental order, without altering or interlining the decree.⁴

It seems, however, that in cases of error in the direction of the decree, where the alteration cannot be made by supplemental order, the Court will direct the Registrar to attend with the decree and make the alteration in open Court, which the Judge will countersign with his initials.⁵

application of either party, may give such further directions as shall become necessary for the purpose of carrying such order or decree into effect according to its spirit and intent. *Leitch v. Cumpston*, 4 Paige, 476. See *Jenkins v. Eldredge*, 1 Wood. & Minot, 61.

¹ See also *Willis v. Parkinson*, 3 Swanst. 233; *Clark v. Hall*, 7 Paige, 382; *Murray v. Blatchford*, 2 Wendell, 221; *Rogers v. Rogers*, 1 Paige, 188; *Sheppard v. Starke*, 3 Munf. 29; *Gibson v. Crehore*, 5 Pick. 146.

² See the 85th Equity Rule of the United States Courts, in note, ante, 1025; *Thompson v. Goulding*, 5 Allen, 82.

³ Cr. & Ph. 78; and see *Askew v. Peddie*, 10 Law J. 45.

⁴ *Lane v. Hobbs*, 12 Ves. 458; see also *Wallis v. Thomas*, 7 Ves. 292; *Lord Clarendon v. Barham*, 12 Law J. (N. S.) Chan. 215; *Needham v. Needham*, 1 Hare, 633. Where the alteration sought is merely consequential upon the decree itself, or the addition of some direction which has been omitted, the omission will be supplied by a distinct order, without altering or interlining the decree itself. *Clark v. Hall*, 7 Paige, 382.

⁵ *Tomlins v. Palk*, 1 Russ. 476; see also *Skrymsher v. Northcote*, 1 Swanst. 573, n. As to the time, within which application should be made to rectify a decree, see *Rogers v. Rogers*, 1 Paige, 188, where leave to amend a decree was refused to a party, who had delayed a year and six months in applying to the Chancellor to correct a mistake in drawing up a decree. See, also, *Bramblett v.*

In *Hawker v. Buncombe*,¹ the order appears to have been that one of the Registrars might be directed to alter the decree.

The Court will, in some cases, extend the indulgence of rectifying decrees in which there have been clerical mistakes, to decrees which have been actually enrolled.² Thus in cases of miscasting, where the matter demonstratively appears upon the decree itself to have been mistaken, it may be explained and rectified by order;³ so, likewise, if some part of the decree be omitted in the enrolment, it may be inserted upon motion to the Court. It is to be observed, that, under the denomination of miscasting, is not to be included any pretended miscasting or misvaluing, but only error in auditing and numbering.⁴

In *Weston v. Haggerston*,⁵ Lord Eldon held that all errors on the face of the schedules could be rectified even after enrolment, but that there could be no correction except of such apparent errors; and he, therefore, held, that no affidavit introducing a new fact, after enrolment, could be permitted. In *Spearing v. Lynn*,⁶ leave was given to amend the title of an order which appears to have been enrolled, although the effect of the alteration was to charge a surety who had been sued at Law under the order, and,

Pickett, 2 A. K. Marsh. 11, and *Burch v. Scott*, 1 Bland, 120, where it was held that a decree may be altered or amended by motion or petition, only during the term: afterwards the application to amend should be by bill. But see *Irwin v. Vint*, 6 Munf. 267.

¹ 2 Mad. 391.

² *Thompson v. Goulding*, 5 Gray, 82; *Clark v. Hall*, 7 Paige, 382; *Beekman v. Peck*, 3 John. Ch. 415. But, generally, a decree which has been regularly obtained and enrolled, cannot be altered except by bill of review. *Bennett v. Winter*, 2 John. Ch. 205; *Wiser v. Blackley*, 2 John. Ch. 488; *Mead v. Arms*, 3 Vermont, 148; *Dexter v. Arnold*, 5 Mason, 303; *Jenkins v. Eldredge*, 1 Wood. & Minot, 61; *Clapp v. Thaxter*, 7 Gray, 384, 386. See *Millspangh v. McBride*, 7 Paige, 509; *Beekman v. Peck*, 3 John. Ch. 415; *Ray v. Conner*, 3 Edw. Ch. 478; *Burch v. Scott*, 1 Bland, 112.

³ For. Rom. 184; Beames's Ord. 3.

⁴ Beames's Ord. 3. In *Miller v. Rushforth*, 3 Green Ch. (N. J.) 174, a final decree after enrolment and execution issued thereon, and after the lapse of nearly three years from the date of the decree, was opened for the purpose of correcting a plain and gross mistake in the Master's report, although the defendant appeared and demurred to the bill, and afterwards suffered a decree *pro confesso* to be taken against him, and an *ex parte* report to be made by the Master.

⁵ Coop. Rep. 134.

⁶ 2 Vern. 376.

relying upon the mistake in the title of the order, had pleaded that there was no such order.¹

It is a well-established principle of the Court, that every order and decree, however erroneous, is good until it is discharged.²

SECTION VI.

Effect of Stat. 1 and 2 Vict. c. 110.

BEFORE we proceed to point out the means which the practice of the Court furnishes to enforce the execution of its decrees and orders, by those who are bound to obey them, it is necessary to call the reader's attention to certain alterations which have taken place in the Law with regard to the effect of decrees in Equity upon the property of those who are subjected to their operation.

Formerly a decree in a Court of Equity, unless it was for the land itself, operated only *in personam*;³ and the only method of

¹ A decree against several defendants will be opened in favor of him only who asks it. *Hodges v. Mullikin*, 1 Bland, 507.

² *Church v. Crewe*, 2 Ph. 115; *Sanders v. Gatewood*, 5 J. J. Marsh. 328. *Vacating decrees.* The Court has powers, at its discretion, after enrolment, to vacate a decree, entered *pro confesso*, to allow a defence upon the merits, when it has been omitted through mistake, accident, or even negligence. *Hall v. Lamb*, 28 Vermont (2 Wms.) 85. As to the authority of the Court over a decree by consent, see *White v. Walker*, 5 Florida, 478. A Court of Chancery has jurisdiction to set aside decrees obtained by fraud, on an original bill filed for that purpose. *Sanford v. Head*, 5 Cal. 297.

³ *Chapman J.*, in *Richmond v. Gray*, 3 Allen, 27. Where lands lie within the reach of the process of the Court, Courts of Equity will not exclusively rely on proceedings *in personam*, but will put the successful party in possession of the lands, if the other party remains obstinate, and refuses to comply with the decree. *Story*, Eq. Pl. § 744; *Buffum's Case*, 13 N. Hamp. 14. A decree in Equity cannot *per se* divest a title at Law, but can only compel the person who has the title, and who is mentioned in the decree, to convey. *Proctor v. Ferebee*, 1 Ired. Eq. 146. A decree of the Circuit Court of the United States, directing a conveyance of land in Ohio, does not itself pass a title, (as decrees of the Courts of Ohio do.) under the statutes of Ohio, but a deed has to be actually made. *Shephard v. Ross County*, 7 Ohio, 271. A decree in Virginia cannot operate on a title to land in Kentucky. But having jurisdiction of the person, the Court may enforce its decree. *Carrington v. Brents*, 1 M'Lean, 167. See *Watts v. Waddle*, *ib.* 200; 2 Story Eq. Jur. § 743, 744. It is sufficient, that the parties to be affected by the decree are resident within the State or country where the suit is brought;

enforcing it was by means of what is termed process of contempt against the party disobeying it, under which the party, if arrested, might be kept in prison till he obeyed. It was also competent to the party claiming the benefit of the decree, where the contemnor either could not be arrested upon the process, or, having been arrested, remained in prison without paying obedience to the Court, to issue a writ of sequestration directing the commissioners therein named, to sequester the personal property of the defendant, and the rents and profits of his real estates, and to keep him from the enjoyment of them, till he has cleared his contempt, in the same manner as in the case of a defendant who had committed a contempt by not appearing and answering the bill. Originally this process was merely used as a means of coercing the defendant, by keeping him out of possession of his property; and the practice of applying the money received by the sequestrators, in satisfaction of the sum decreed to be paid, is of comparatively modern origin.¹ This, however, as we shall see in the next section, has become the usual course of proceeding, and the Court will now, where a sequestration has been issued to enforce a decree for the payment of money, order the sequestrators to apply what they have received, by virtue of the sequestration, in satisfaction of the duty to be performed. Still, however, this is only a personal proceeding, and does not alter the nature of the decree, which, being *in personam*, abates by the death of the individual charged, and does not affect his property further than by enabling the party claiming the benefit of it to come in *pari passu* with the other creditors, against the personal estate. A sequestration may certainly be revived against the personal representative of the party, but it cannot be revived

for in all suits in Equity, the primary decree is *in personam* and not *in rem*. 2 Story Eq. Jur. § 744; Johnson v. Petrie, 10 Sumner's Vesey, 164, note; Wharton v. May, 5 ib. 71, note (a); Massie v. Watts, 6 Cranch, 148, 158; Ward v. Arredondo, 1 Hopk. 213; Mead v. Merritt, 2 Paige, 402; Dehon v. Foster, 4 Allen, 545; Mitchell v. Bunch, 2 Paige, 615; Sutphen v. Fowler, 9 Paige, 282; Great Falls Manuf. Co. v. Worster, 3 Foster (N. H.) 462. In relation to the effect of a decree as a lien on property, see post, 1048, note.

But a decree in Equity substantially of the nature of a decree of foreclosure, is not an absolute decree *in personam*, which will merge the original debt, or support an action of debt. Manley v. Slason, 28 Vermont (2 Wms.) 346. No personal decree can be made against an absent debtor unless he appears. If he does appear, there may be a personal decree, and a decree subjecting the attached effects. O'Brien v. Stephens, 11 Gratt. (Va.) 610.

¹ See Wharam v. Broughton, 1 Ves. 182.

against his heir, unless the real estate is the subject of the suit ; so that, after the death of the defendant, the proceeding by sequestration may be a very inefficient means of enforcing the demand, and certainly is not equal in effect to a judgment at Law. It is true, as stated by Lord Chief Baron Gilbert,¹ that “ a decree has the same authority to bind the personal assets as a judgment at Law, and therefore, shall go *pari passu* to be paid off and discharged ” ;² but as the *lien* of the judgment came in by the Statute of Westminster, 13 Edw. 1, c. 18, which only gives an *elegit* for a moiety of the land in satisfaction of the debt, therefore that could give no authority to lay a sequestration on the real estate for a mere personal duty when the heir is not bound in the covenant ;³ so that, in cases where the land is not the subject-matter of the suit, a decree in Equity will not, according to the law as it existed before the 1 & 2 Vict. c. 110, have the same effect as a judgment at Law in binding the real estate. This defect in the Law, as regards decrees in Equity, has, however, been remedied by the above statute ;⁴ which has provided, “ That all decrees and orders of Courts of Equity, and all rules of Courts of Common Law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior Courts of Common Law ; and the persons to whom any such moneys or costs, charges or expenses, shall be payable, shall be deemed judgment creditors, within the meaning of the said Act.”

It is also enacted, that all powers thereby given to the Judges of the superior Courts of Common Law, with respect to matters depending in the same Courts, shall and may be exercised by Courts of Equity with respect to matters therein depending, and by the Lord Chancellor, and by the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy ; and all remedies thereby given to judgment creditors are in like manner

¹ For. Rom. 87.

² *Morrice v. Bank of England*, Ca. Temp. Talb. 217 ; 3 P. Wms. 401, n. S. C. ; 3 Swanst. 573, S. C. ; *Martin v. Martin*, 1 Ves. 214 ; *Joseph v. Mott*, Prec. in Chanc. 79 ; *Bishop v. Godfrey*, ib. 179 ; *Searle v. Lane*, 2 Vern. 37, 88 ; 2 Freem. 103, S. C. ; *Grey v. Chiswell*, 9 Ves. 125.

³ See *Bligh v. Lord Darnley*, 2 P. Wms. 621 ; *Astley v. Powis*, 1 Ves. 496 ; *Mildred v. Robinson*, 19 Ves. 588.

⁴ Sect. 18.

given to persons to whom any moneys or costs, charges or expenses, are by such orders or rules respectively directed to be paid.

The effect of the above statute is to give to decrees in Courts of Equity, provided they have been registered in the manner directed by the Act,¹ the same effect as the same statute gives to judgments at Law.² And here it is to be observed, that the Act gives a much larger effect to judgments at Law, and, by consequence, to decrees or orders in Equity, than they before enjoyed; for, by the 11th section, which expressly recites, that "*the existing law is defective, in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors,*" and "*that it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law,*" it is enacted, that it shall be lawful for the sheriff or other officer to whom any writ of *elegit*, or any precept in pursuance thereof, shall be directed at the suit of any person, upon any judgment, which at the time, appointed for the commencement of the Act shall have been recovered, or shall be thereafter recovered, in any action in any of her Majesty's superior Courts at Westminster, to make and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him,

¹ Ante, p. 783.

² *Thompson v. Brown*, 4 John. Ch. 636. Decrees, in New York, are liens on real estate only from the time of being docketed, not from the period of enrolment. *Norton v. Talmadge*, 3 Edw. Ch. 310. See *Dawson v. Scriven*, 1 Hill Ch. (S. C.) 177.

A decree for alimony, to be paid in instalments, does not operate as a lien upon the real estate of the defendant in Ohio unless made a charge thereon by the decree itself. *Olin v. Hungerford*, 10 Ohio, 268.

A decree in one State cannot operate upon the title to land in another State; but having jurisdiction of the person, the Court may enforce its decree. *Carrington v. Brents*, 1 M'Lean, 167; *Watts v. Waddle*, 1 M'Lean, 200; 2 Story Eq. Jur. § 734, 735; *Willis v. Cowper*, 2 Ohio, 124; *Henry v. Doctor*, 9 Ohio, 49.

South Carolina. A decree in Equity for the payment of money, constitutes a lien on land, similar to that of a judgment at Law, so as to bind it in the hands of a purchaser, who has not gained a title under the Statute of Limitations. *Blake v. Heywood*, 1 Bailey Eq. 208; *Woddrop v. Price*, 3 Desaus. 206. The lien of such decree commences from the day on which it is delivered to the commissioner, and is filed by him. *Dawson v. Scriven*, 1 Hill Ch. 177.

shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out; which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the Court, out of which such execution shall have been sued out, as a tenant by *elegit* is now subject to in a Court of Equity: and that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable, and is thereby required, to make, perform, and render to the lord of the manor, or other person entitled, all such and the like payments and services as the person against whom such execution shall be issued, would have been bound to make, perform, and render, in case such execution had not issued; and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments and the value of such services, as well as the amount of the judgment, shall have been levied; and it is also provided, that, as against purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of the said Act, such writ of *elegit* shall have no greater or other effect than a writ of *elegit* would have had in case the said Act had not passed.

The 12th section also provides, that, by virtue of any writ of *fieri facias* to be sued out of any superior or inferior Court, after the time appointed for the commencement of the said Act, or any precept in pursuance thereof, the sheriff or other officer having the execution thereof, may and shall seize and take any money or bank notes (whether of the governor and company of the Bank of England, or of any other bank or banker), and any checks,¹ bills of exchange, promissory notes, bonds, specialties, or other securities

¹ As to the seizure of checks in the Accountant-General's Office, see *Courtoy v. Vincent*, 15 Beav. 486; *Watts v. Jefferyes*, 3 Mac. & Gor. 422.

for money, belonging to the person against whose effects such writ of *feri facias* shall be sued ; and may or shall pay or deliver to the party suing out such execution, any money or bank notes which shall be so seized, or a sufficient part thereof ; and may and shall hold any such checks, bills of exchange, promissory notes, bonds, specialties, or other securities for money, as a security or securities for the amount by such writ of *feri facias* directed to be levied, or so much thereof as shall not have been otherwise levied and raised ; and may sue in the name of such sheriff or other officer, for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived ; and that the payment to such sheriff or other officer, by the party liable on any such check, bill of exchange, promissory note, bond, specialty or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such check, bill of exchange, promissory note, bond, specialty, or other security ; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied : and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued. It is provided, however, that no such sheriff or other officer shall be bound to sue any party liable upon any such check, bill of exchange, promissory note, bond, specialty or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action.

The 13th section of the Act (which is framed for the express purpose of giving to judgments the effect of express charges upon real estates) enacts, that a judgment already entered up, or to be thereafter entered up, against any person in any of her Majesty's superior Courts at Westminster, shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents and heredita-

ments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed or entitled, for any estate or interest whatever, at Law or in Equity, whether in possession, reversion, remainder or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment; and shall also be binding as against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion or other interest, in or out of any of the said lands, tenements, rectories, advowsons, tithes rents and hereditaments.

It is provided also, by the same section, that every judgment creditor shall have such and the same remedies in a Court of Equity, against the hereditaments so charged by virtue of the said Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same, with the amount of such judgment debt and interest thereon; but that no judgment creditor shall be entitled to proceed in Equity, to obtain the benefit of such charge, until after the expiration of one year from the time of entering up such judgments;¹ or in cases of judgments already entered up, or to be entered up, before the time appointed for the commencement of the said Act, until after the expiration of one year from the time appointed for the commencement of the said Act, and that no such charge shall operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy; and also, that as regards purchasers, mortgagees or creditors, who shall have become such before the time appointed for the commencement of the said Act, such judgment shall not affect lands, tenements or hereditaments, otherwise than as the

¹ Although twelve months have not elapsed since registration, *Derbyshire Railway Company v. Bainbrigge*, 15 Beav. 146.

same would have been affected by such judgment if the said Act had not passed. It is also provided, that nothing therein contained shall be deemed or taken to alter or affect any doctrine of Courts of Equity, whereby protection is given to purchasers for valuable consideration without notice.

In order to render the operation of a judgment effective against any stock, which the person bound by it may have in the public funds or in any public company, and to prevent the transfer of such stock before the necessary steps can be taken for that purpose, the 14th section enacts, that if any person against whom any judgment shall have been entered up in any of her Majesty's superior Courts at Westminster, shall have any government stock, funds or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his own name in his own right, or in the name of any person in trust for him, it shall be lawful for a Judge of one of the superior Courts,¹ on the application of any judgment creditor, to order that such stock, funds, annuities or shares, or such of them, or such part thereof respectively, as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered and interest thereon; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favor by the judgment debtor.² It is to be noticed, that the same section directs, that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order;³ but in order to prevent any person against whom judgment shall have been obtained from transferring, receiving or disposing of any stock, funds, annuities or shares, thereby authorized to be charged for the benefit of the judgment creditor under an order of a Judge, it is enacted,⁴ that every order of a Judge, charging any government stock, funds or annuities, or

¹ It has been held that the order can only be made by a Judge at Common Law, not in Equity; *Hulkes v. Day*, 10 Sim. 41; though it would seem otherwise from the case of *Westby v. Westby*, 5 De G. & Sm. 516.

² By 3 & 4 Vict. c. 82, § 1, an order may be made, charging funds standing in the name of the Accountant-General.

³ He may, however, take proceedings to protect his interest; *Bristed v. Wilkins*, 3 Hare, 235; *Watts v. Jefferyes*, 3 Mac. & Gor. 372; *Reece v. Taylor*, 5 De G. & Sm. 480.

⁴ Sect. 15.

any stock or shares in any public company, under the said Act, shall be made, in the first instance, *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any government stock, funds or annuities, standing in the name of a judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the governor and company of the Bank of England from permitting a transfer of such stock in the mean time, and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer, shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment, and that no disposition of the judgment debtor, in the mean time, shall be valid or effectual as against the judgment creditor; and further, that unless the judgment debtor shall, within a time to be mentioned in such order, show to a Judge of one of the said superior Courts, sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute; and it is also provided, that any such Judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs, upon such application, as he may think fit.¹

It is however enacted,² that if any judgment creditor, who, under the powers of that Act, shall have obtained any charge, or be entitled to the benefit of any security whatsoever, shall afterwards, and before the property so charged or secured shall have been converted into money or realized, and the produce thereof applied towards payment of the judgment debt, cause the person of the

¹ For more upon the subject of this section, see post, Chapter on Injunctions.

² Sect. 16.

judgment debtor to be taken or charged in execution upon such judgment, then and in such case such judgment creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly.

It is to be observed, that by the 17th section every judgment debt shall carry interest, at the rate of 4*l.* per cent per annum, from the time of entering up the judgment, or from the time of the commencement of the Act, in cases of judgments then entered up and not carrying interest, until the same shall be satisfied ; and such interest may be levied under a writ of execution on such judgment. Moreover, under the 12th section of the Act, judgment creditors may seize money about to be paid to their debtor out of the Court of Chancery.

SECTION VII.

Of Enforcing the Execution of Decrees.

UNTIL the Act of Parliament, which has been discussed in the preceding section, came into operation, the performance of a decree or order of the Court could only be enforced by process of contempt against the person ; in which respect the proceedings of Courts of Equity differed materially from those of Courts of Law, where the writs, by which execution of their judgments are compelled, are not founded upon any contempt of the Court, committed by the defendant, but are considered as a means of satisfying the plaintiff.

In Equity, however, the case was different, for till the Orders of the 10th of May, 1839, were promulgated, the process for enforcing obedience to decrees and orders of the Court was in all cases founded upon contempt. Those Orders made an important alteration in the law of the Court, by providing the forms of writs of *feri facias*, *elegit* and *venditioni exponas*, similar to those adopted by Courts of Law, which a party may resort to for the purpose of obtaining satisfaction of any pecuniary demand arising from a decree or order of the Court of Chancery.¹

¹ It is a general rule that Courts of Chancery have the power to issue all process that may be necessary to carry their decrees into effectual execution. *Ludlow v. Lansing*, 1 Hopk. 231 ; *Charles River Bridge v. Warren Bridge*, 6 Pick.

These writs are devised, pursuant to the direction of the statute 1 & 2 Vict. c. 110, by which, as we have seen,¹ the same effect is given to *decrees and orders of Courts of Equity*, provided they are duly entered with the proper officer of the Court of Common Pleas, pursuant to the 19th section, as is given by the Act to judgments in the superior Courts of Common Law.²

The effect of these writs has been mentioned in the preceding section,³ and it is therefore merely necessary, in this place, to call the reader's attention to the regulations respecting them, which have been promulgated by the above Orders.⁴

By those Orders it is provided, 1st, "That every person to whom in any cause or matter pending in the Court, any sum of money, or any costs, have been ordered to be paid, shall, after the lapse of *one month from the time when such order for payment was duly passed and entered*, be entitled, by his solicitor, to sue out one or more writ or writs of *feri facias*, or writ or writs of *elegit*, of the form thereafter stated, or as near thereto as the circumstances of the case may require."⁵

By the 2d Order of the 10th of May, 1839, it is directed, "That upon every such order thereafter to be entered, the entering clerk of the Court, in whose division the same may be, shall, at the re-

395; *Jones v. Boston Mill Corp.* 4 Pick. 509; *Grew v. Breed*, 12 Metcalf, 363, 370, 371; *Scott v. Jailer*, 1 Grant's Cases (Penn.) 237.

To enforce the execution of a decree for the payment of money, and also for indemnification, in Maryland, the plaintiff may have a *ca. sa.* and an attachment at the same time. *Bryson v. Petty*, 1 Bland, 183. See *Brockway v. Copp*, 2 Paige, 578; *Patrick v. Warner*, 4 Paige, 397; *People v. Bennett*, *ib.* 282; 2 Hoff. Ch. Pr. 92; *Minthorne v. Tompkins*, 2 Paige, 102; *Hall v. Dana*, 2 Aiken, 381; *Wallen v. Williams*, 7 Cranch, 602; *Kershaw v. Thompson*, 4 John. Ch. 609; *Richardson v. Jones*, 3 Gill and John. 163.

But a decree in Equity for the payment of money due upon a contract, cannot be enforced by attachment, in Pennsylvania, since the Act of July 12, 1842, abolishing imprisonment for debt. *Scott v. Jailer*, 1 Grant's Cases (Penn.) 237.

¹ Ante, p. 783.

² In Massachusetts, "the Court may issue writs of seisin and execution in common form when such process appears to be an appropriate method of enforcing a decree in Equity." Genl. Sts. c. 113, s. 23.

³ Ante, p. 799.

⁴ These orders issued under the authority of the 20th section of the Act.

⁵ The 11th and 12th Orders of August, 1841, have provided another mode of compelling the payment of money ordered by a decree; but they have not superseded the remedies given by the Orders of May, 1839. *Streeton v. Whitmore*, 5 Beav. 228.

quest of the party leaving the same, mark the day of the month and year on which the same shall be left for entry, and no writ of *fieri facias* or *elegit* shall be sued out upon any such order, unless the date of such entry shall be so marked thereon as aforesaid.”¹

By the 3d, “That such writs, when sealed, shall be delivered to the sheriff or other officer to whom the execution of the like writs issuing out of the superior Courts of Common Law belongs, and shall be executed by such sheriff or other officer, as nearly as may be, in the same manner in which he doth or ought to execute such like writs; and such writs, when returned by such sheriff or other officer, shall be delivered to the solicitors by whom respectively they were sued out, or be left at their respective seats, and shall thereupon be filed as of record in the office of the Record and Writ Clerks of this Court. And that for the execution of such writs, such sheriff or other officer shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority for the execution of the like writs issuing out of the superior Courts of Common Law.”²

By the 4th, “If it shall appear upon the return of any such writ of *fieri facias* as aforesaid, that the sheriff or other officer hath, by virtue of such writ, seized but not sold any goods of the person ordered to pay such sum of money or costs as aforesaid, the person to whom such sum of money or costs are payable, shall, immediately after such writ with such return shall be filed as of record, be at liberty, by his solicitor, to sue out a writ of *venditioni exponas*, in the form thereafter stated, or as near thereto as the circumstances of the case may require.”

By the 5th, “On every such writ of *fieri facias* and *elegit*, so to be issued as aforesaid, there shall be indorsed the words, ‘By the Court,’ and also, thereunder, the calling and place of residence of the party against whom such writ shall be issued, and also the name and residence or place of business of the solicitor at whose instance the same shall be issued; and that every such writ be also indorsed for the sum to be levied, according to the form used upon like writs issuing out of the superior Courts of Common Law.”

¹ If the sum levied under the *fi. fa.* does not satisfy the amount due, it appears that another writ may issue into another county. *Spencer v. Allen*, 2 Phil. 215.

² The sheriff levying under this writ, when issued by the Court of Chancery, is not entitled to an injunction to restrain proceedings against him by strangers to the suit. *Rock v. Cook*, 2 De G. & Sm. 493; 2 Phil. 691.

By the 6th, "For every such writ of *fiery facias* or *venditioni exponas*, so to be issued as aforesaid, there shall be allowed to the Record and Writ Clerk issuing the same the sum of eighteen shillings and seven pence; and for every such writ of *elegit*, the sum of one pound ten shillings; and that there be allowed to the solicitor, at whose instance any such writ of *fiery facias*, *elegit*, or *venditioni exponas* shall be issued, the sum of six shillings and eight pence for instructions for the said writ; and that there also be allowed to such solicitor the further sum of six shillings and eight pence for attending to procure a warrant, and for attending to instruct the officer charged with the execution of such writ."

It is to be observed, that the above orders and writs do not supersede the ordinary remedies of the Court for enforcing its decrees and orders, and that in fact they are only applicable to cases in which money or costs are decreed or ordered to be paid by one party to another; they are, consequently, totally inapplicable to cases where any other act is ordered to be done by a party, or even to cases of orders for payment of money into the name of the Accountant-General of the Court; orders or decrees of this description must, therefore, still be enforced by the ordinary process.¹

¹ It is to be recollected, that, by the 16th sect. of the 1 & 2 Vict. c. 110, it is provided, that if any judgment creditor, who, under the powers of the Act, shall have obtained any charge, or be entitled to the benefit of any security whatsoever, shall afterwards, and before the property so charged or secured shall have been converted into money or realized, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment, then and in such case such judgment creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly; so that, although Courts of Equity do not enforce their judgments by *ca. sa.*, as the Courts of Law, but merely by process of contempt, upon which a party in default may be arrested for not obeying the order of the Court, yet as such process is generally considered as in the nature of an execution, it is probable that it will be held, that, upon the equity of the statute, a party arresting another upon such process to enforce the performance of a decree, will have deprived himself of the benefit of the statute. By the 10th Equity Rule of the United States Courts it is provided that "Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process, as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the Court may be enforced, shall be liable to the same process for enforcing obedience to such order, as if he were a party in the cause.

Under the original jurisdiction of the Court of Chancery, no compulsory process issued against any party until he had been served with a mandate under the Great Seal, commanding him to do what the Court required of him ; for the offence committed was the not paying obedience to the Great Seal,¹ consequently, the mere service of a copy of the decree or order was not sufficient, but a writ under the Great Seal was necessary.

The Orders of August, 1841, made an alteration in this respect, by the 10th of which it is directed, "That no writ of execution shall hereafter be issued for the purpose of requiring or compelling obedience to any order or decree of the High Court of Chancery ; but that the party required by any such order or decree to do any act shall, upon being duly served with such order, be held bound to do such act in obedience to the order or decree."²

The 10th Order of August, 1841, as amended by the 6th Order of April, 1842, having provided that no writ of execution shall now be issued, there is no longer any necessity for this short order as a foundation for the suing out of such a writ ; moreover, a separate order is not now requisite for the purpose of fixing the time within which a party is to comply with the commands of a decree, for the 12th Order of August, 1841, as amended by the 6th Order of April, 1842, has directed, "That every order or decree requiring any party to do an act thereby ordered, shall state the time or the time after service of the decree, or order within which the act is to be done ; and that upon the copy of the order or decree, which shall be served upon the party required to obey the same, there shall be indorsed a memorandum in the words or to the effect following, viz. : — '*If you, the within-named A. B., neglect*

¹ For. Rom. 166.

² By the 8th Equity Rule of the United States Courts, "Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at Common Law in actions of assumpsit." An additional rule made April 18, 1864, provides that in suits in Equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any of the Courts of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule above stated, where the decree is solely for the payment of money. 1 Wallace (U. S.) Rep. Before this last rule, execution could not issue in such a case. *Orchard v. Hughes*, 1 Wallace (U. S.) 73 ; *Noonan v. Lee*, 2 Black (U. S.) 499.

to obey this order or decree by the time therein limited, you will be liable to be arrested, by virtue of a writ of attachment issued out of the Court of Chancery or by the Serjeant-at-arms attending the High Court of Chancery; and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order or decree.'"¹

Under these Orders, all that is necessary as a foundation for process of contempt against a party neglecting to comply with the terms of a decree or order, is, that such party should have been duly served with a copy of the decree or order. This service must be personal.² We have before seen the manner in which personal service is ordinarily effected.³

Where the decree or order sought to be enforced is for payment of money to a party, if the party to receive the money does not serve it himself, so that he may, by the immediate authority of the decree, receive the money, it will be necessary that the person who does serve it should have and show to the party on whom he serves it, a letter of attorney from the person to receive the money, and he must also make a demand of the money.⁴ This is necessary in cases of decrees for the foreclosure or redemption of mortgages, before a final order can be obtained, and it is equally necessary in all cases where money is ordered to be paid to a party himself. Where the money is not to be paid to the party himself, but into the name of the Accountant-General of the Court, or where anything else is to be done, such as the transfer of stock, no demand is necessary.

When the person to pay avoids service, an order for substituted

¹ This and the 11th Order on the next page have been held to apply to a cause only and not to a matter. See the note to *Re Minter*, 19 Beav. 34. By the 8th Equity Rule of the United States Courts, if the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivery up of deeds, or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound to take notice without further service; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the Court or of a Judge thereof, upon motion and affidavit, enlarging the time for the performance thereof.

² *Parrott v. Quernan*, Halst. Dig. 178.

³ See ante, p. 432.

⁴ *Re Mourilyan*, 13 Beav. 84.

service may be obtained, and further demand for payment dispensed with.¹

The process of contempt against a party for disobedience of a decree differs very little from the process issued for a contempt in not appearing and answering. The first step in the process is a writ of attachment,² the form of which is the same with that on *mesne process*,³ but the indorsement explains the purpose for which it was issued,⁴ which is also the case when the attachment is for non-payment of costs.⁵ This writ issues without order upon the Record and Writ Clerk being satisfied by affidavit of the due service of the order or decree, and is subject to the same rules with regard to its execution and return as an attachment in *mesne process*, which have been fully discussed in a former part of this treatise.⁶

It is to be observed, however, that an attachment for non-performance of a decree is not, like an attachment for non-appearing or answering, aailable process, and that the party, when taken upon it, must be committed to prison, and not suffered to go at large. And it seems that if, after arresting a defendant upon an attachment for not obeying a decree or order for payment of money, the sheriff suffers him to go at large, the sheriff himself will be ordered, upon motion, to pay the money.⁷ In *Solly v. Greathead*,⁸ a similar order was made by Lord Eldon, who ordered a sheriff not only to pay the money for which the attachment was issued, but the costs of the contempt incurred by the party and of the application.

By the 11th Order of August, 1841, it is directed, "That if any party, who is by an order or decree ordered to pay money, or do any other act in a limited time, shall, after due service of such order or decree, refuse or neglect to obey the same according to the exigency thereof, the party prosecuting such order or decree

¹ *In re Mourilyan*, 13 Beav. 84; *De Manneville v. De Manneville*, 12 Ves. 203; and the note to *Skegg v. Simpson*, 2 De G. & Sm. 456.

² See *Armstrong v. Beaty*, Cam. & Nor. 33; *Birchett v. Bolling*, 5 Munf. 442; *Gilmore v. Gilmore*, 40 Maine, 50, 53, 54.

³ Ante, p. 452.

⁴ 1 Harr. ed. 1808, 333.

⁵ Ibid.

⁶ Ante, p. 453 *et seq.*

⁷ *Levett v. Letteney*, Beames on Costs, Appx. 352.

⁸ Ib. 353; see also *Anon.* 11 Ves. 170, S. C.

shall, at the expiration of the time limited for the performance thereof, be entitled to a writ or writs of attachment against the disobedient party; and in case such party shall be taken or detained in custody under any such writ of attachment, without obeying the same order or decree, then the party prosecuting the same order or decree, shall, upon the sheriff's return that the party has been so taken or detained, be entitled to a commission of sequestration against the estate and effects of the disobedient party; and in case the sheriff shall make the return *non est inventus* to such writ or writs of attachment, the party prosecuting the same order or decree shall be entitled, at his option, either to a commission of sequestration in the first instance, or otherwise to an order for the Serjeant-at-arms, and to such other process as he hath hitherto been entitled to, upon a return of *non est inventus*, made by the commissioner named in a commission of rebellion issued for the non-performance of an order or decree.”¹

In the form in which this order was originally issued, it seems to have allowed of an order for the Serjeant-at-arms being obtained at once without any writ of attachment having been issued. It was, however, amended by the 6th Order of April, 1842, and the practice of rendering an attachment necessary in the first instance restored. It may be observed, that this Order does not interfere with the practice previously stated, which enables a party to whom money or costs have been ordered to be paid, to issue writs of *feri facias* or *elegit*, under the Orders of May, 1839.²

Under the 11th Order of August, 1841, we have seen that upon the sheriff's return of *non est inventus* an order may be obtained for the Serjeant-at-arms. An order of this nature has hitherto been applied for by motion in Court, the reason of which is stated to be because, as there is nothing to issue under the Great Seal to make it a record of the Court, there must be some act of the Court to authorize the Serjeant-at-arms in going.

Upon the return by the sheriff, the party issuing the attachment must, if he wishes to obtain a sequestration against him, obtain a writ of *habeas corpus cum causis*, upon which he will be brought up to the Court, and, upon motion, ordered to be turned over to the Queen's Prison, in the same manner as where he is brought up on an attachment on *mesne process*.

¹ For form of Order, see Seton on Decrees, 630.

² *Streeten v. Whitmore*, 5 Beav. 228, and ante, pp. 1055, 1056.

If the Serjeant-at-arms finds the party already in custody, he must lodge a detainer against him at the prison where he is confined, and make a return of his having so done to the Court, whereupon the party may be brought up by *habeas corpus cum causâ* and handed over to the Queen's Prison.¹

If the Serjeant-at-arms is unable to arrest the party against whom the decree is made, he must return *non est inventus* upon his warrant, upon which a writ of sequestration will issue upon motion under the old practice of the Court, in the same manner as upon *mesne process*.² This writ formerly issued only upon the return of the Serjeant-at-arms, but now we have seen that in some cases upon *mesne process* it may be obtained upon the return of the sheriff.³ And under the 11th Order of August, 1841, upon the return of the sheriff of *non est inventus* to a writ of attachment, the party prosecuting a decree is entitled at his option to a commission of sequestration in the first instance, or to an order for the Serjeant-at-arms.⁴ The writ of sequestration also issues where the party has been taken upon process under a decree and committed to prison.⁵

It seems, however, that he must first have been removed into the Queen's Prison (if he is not already there), by *habeas corpus* ;

¹ 1 Smith, 432.

² See ante, p. 477.

³ Ante, p. 478.

⁴ Page 1060. By the 8th Equity Rule of the United States Courts, "If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon a return of *non est inventus*, to compel obedience to the decree."

⁵ 11th Order, August, 1841, *Errington v. Ward*, 8 Ves. 314. The rule is different in cases of contempt upon *mesne process*. A sequestration is proper, if the defendant obstinately lie in jail to save his estate, or exhausts it in paying other creditors, to the injury of the plaintiff. *Ross v. Colville*, 3 Call, 382. So, it may issue where the defendant is about to remove, to avoid a decree, which he expects will be made against him. *Anon.* 1 Hayw. 347. But it will not be ordered upon an unsupported affidavit, that the defendant is wasting his effects. *Spiller v. Spiller*, 1 Hayw. 482. The affidavit on which an order of sequestration is awarded, should state positively the existence of the facts on which the application is granted, or, if only matter of belief, the grounds of belief should be stated. *Edwards v. Massey*, 1 Hawks, 359. Where a party perseveres in his refusal to deliver over property to a receiver, the property may be sequestered, and his servants and agents, &c., will be prohibited from delivering it to him or applying it to his use, on pain of contempt. *People v. Rogers*, 2 Paige, 103. Upon a decree for dower, there can be no sequestration of the two thirds to satisfy the claim for rents and profits of the dower. *Chase's Case*, 1 Bland, 372.

and that the motion for a sequestration may be made upon a certificate of the governor of the prison, that he is in his custody for contempt of the order,¹ but that it must not be made till the time for the return of the writ upon which the party has been taken has expired; because, until the return of the writ, it is quite uncertain whether the party will pay the money or not.²

The process of sequestration is a writ or commission issuing under the Great Seal, sometimes directed to the sheriff or (which is most usual) to certain persons of the plaintiff's own nomination, empowering him or them to enter upon and sequester the real and personal estate and effects of the defendant (or some particular part or parcel of his lands), and to take, receive and sequester the rents, issues and profits thereof, and keep the same in their hands, or pay the same in such manner and to such persons as the Court shall in its discretion appoint, until the parties shall have appeared to or answered the plaintiff's bill (or performed some other matter which has been ordered and enjoined by the Court, in the process specifically mentioned,) and for not doing whereof he is in contempt.³

Sequestrations are stated to have been first introduced in Sir Nicholas Bacon's time, and then were but sparingly used in process, and after a decree to sequester the thing in demand only.⁴ It is said that the first instance of a sequestration after a decree was in Sir Thomas Read's case, in Lord Coventry's time. Another was issued in *Lake v. Meares*,⁵ 11 Jac., and in the case of *Hide v. Petit*, in 1666,⁶ which was affirmed in part. The same process appears to have been adopted by the Court of Exchequer in *Grea-vus v. Fontaine*, 1687, and in a case of *Witham v. Bland*,⁷ in Lord Shaftesbury's time.

There appear, however, to have been great struggles between the Courts of Common Law and Courts of Equity before this process was established, the former holding that a Court of Conscience

¹ *Phillips v. Stephenson*, 11 Pri. 473.

² *Martin v. Kerridge*, 3 P. Wms. 240; and see further *Const v. Barr*, 2 S. & S. 452; and S. C., 2 Russ. 16; see also *Knowles v. Chapman*, 2 R. 166, n.

³ Hind. 127; *Angell & Ames Corp.* § 670.

⁴ *Earl of Kildare v. Sir M. Eustace*, 1 Vern. 421. See *Shaw v. Wright*, 3 Vesey (Sumner's ed.) 22, note (a).

⁵ Toth. 176.

⁶ 1 Cha. Ca. 93; *Freeman*, 125, 168, S. C.; and *Bedinfield v. Zeuch*, *ibid.*

⁷ 2 Cha. Ca. 43; Hind. 128.

could only give *remedy in personam* and not *in rem*, and that sequestrators were trespassers, against whom an action at Law would lie;¹ and to such extent does the objection of the Courts of Law to this process appear to have been carried, that according to a case cited by the Lord Chancellor (Nottingham), in *Colston v. Gardiner*,² a question was entertained upon an indictment for murder, where one was killed on laying on a sequestration, whether the homicide was justifiable or not. "Whereupon a pardon was sued out."³

"But these were such bloody and desperate resolutions, and so much against common justice and honesty, which required that the decrees of this Court, which preserved men from fraud and deceit, should not be rendered illusory, that they could not long stand,"⁴ and the process is become, by long use and acquiescence, and is now looked upon as the legal and ordinary process of the Court.⁵

A sequestration is usually directed to four sequestrators, and care ought to be taken that the persons named be such as are able to answer for what shall come to their hands in case they should be called upon to account.⁶

The form of the writ must be slightly varied, according to circumstances, but may be in the following form:—

"*Victoria, &c.*

To, &c., greeting.

"*Whereas A. B. complainant, exhibited his bill of complaint in our Court of Chancery against C. D. defendant:*

"*And whereas the said C. D. being duly served with a writ issuing out of our said Court, commanding him, under the penalty therein mentioned, to appear to and answer the said bill, hath refused so to do; and thereupon process of contempt hath issued against him unto a Serjeant-at-arms:*

¹ *Blagrove v. Watts*, 1 More, 549; Cro. Eliz. 651.

² 2 Cha. Ca. 44.

³ Gilb. For. Rom. 78.

⁴ Ibid. 2 Cha. Ca. 45.

⁵ Hind. 128. Where *nulla bona* has been returned to a sequestration in this country, another sequestration may be issued against the defendant's property in Ireland; *Fryer v. Bernard*, 2 P. Wms. 261; but for a sequestration to the colonies, application must be made to the King in Council. Ibid.

⁶ 1 Har. 143; *Angell & Ames Corp.* § 670. See *Ammant v. New Alexandria*, &c. Turn. Co. 13 Serg. & R. 210.

“And whereas the said C. D. hath of late absconded, and so concealed himself that the said Serjeant-at-arms hath not been able to find him, as by the certificate of the said Serjeant-at-arms appears: Know ye, therefore, that we, in confidence of your prudence and fidelity, have given, and by these presents do give to you, any three or two of you, full power and authority to enter upon all the messuages, lands, tenements and real estate whatsoever of the said C. D., and to collect, receive and sequester into your hands, not only all the rents and profits of the messuages, lands, tenements and real estate, but also all his goods, chattels and personal estate whatsoever: And therefore we command you, any three or two of you, that you do, at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements and real estate of the said C. D., and that you do collect, take and get into your hands, not only the rents and profits of all his said real estate, but also all his goods, chattels and personal estates, and detain and keep the same under sequestration in your hands until the said C. D. shall fully answer the complainant’s bill, clear his contempt, and our said Court make other order to the contrary.

*“Witness ourself at Westminster, the day of , in the year of our reign.”*¹

This writ is always obtained upon motion.² If it be moved for upon a return of *non est inventus* by the Serjeant-at-arms, the counsel who moves must have the warrant with the return in his hand.³ If the party in contempt has resisted the serjeant, or having been taken has made his escape and stands out in contempt, in such cases the motion must be supported by an affidavit of the facts.⁴

No sequestration can be granted upon petition.⁵

The order for this writ must be left with the Record and Writ Clerk, and a *præcipe* in the following form: —

¹ Veal’s Record and Writ Practice, p. 46.

“The Writ must be indorsed —

Commission of Sequestration.

A. B. v. C. D.

(Name and Address of Plaintiff’s Agent and Solicitor.)”

² Angell v. Ames, Corp. § 670.

³ Hind. 136.

⁴ Ibid.

⁵ Beames’s Ord. 35, 215.

“ A. B. } Seal a commission of sequestration against C. D.
 v. } for not answering ats. A. B., directed to
 C. D. } Commissioners.
 Order dated day of November.
 (Tested.)
 (Name and address of London solicitor.) ”

When a sequestration is to be executed, it should be delivered by the solicitor to the sequestrators, with proper instructions for carrying it into effect.¹

The sequestrators are officers of the Court, and as such are amenable to its authority, and are to act from time to time in the execution of their office as they shall be directed ; they are to account for what comes to their hands, and are to bring the money into Court as they shall be directed, to be put out at interest, or otherwise, as shall be found necessary ; but such money is not usually paid to the plaintiff, but is to remain in Court till the defendant hath appeared, or answered, or cleared his contempt, and then whatsoever hath been seized shall be accounted for and paid over to him.²

In this respect, Lord Hardwicke observed, there is a difference between a sequestration upon *mesne process* and a sequestration to compel the payment of money under an order or decree ; for in the latter case, after the process has been executed, and goods and estate sequestered under it, the plaintiff may have them applied to satisfy his demand, which he cannot have upon process for contempt.³ It is said, however, in the books, that even in the case of a sequestration upon *mesne process* the Court has the whole under its power and may do therein as it pleases, and as shall be most agreeable to the justice and equity of the case ;⁴ and in *Maynard v. Pomfret*,⁵ where a defendant, in contempt for want of answer, had stood out the whole process to a sequestration, whereupon the bill was taken *pro confesso* against him, and a decree made *ad computandum*, Lord Hardwicke himself refused to discharge the sequestration on the defendant's paying the costs of contempt only, but kept it on foot as a security for his appearing to account.

¹ 1 T. & V. 122.

² Hind. 138.

³ *Davis v. Davis*, 2 Atk. 24.

⁴ Hind. 139.

⁵ 3 Atk. 468.

It should be noticed that, in the above case, the material part of it, as against the defendant, was the discovery to be elicited from him by his answer, and that the object of keeping the sequestration on foot was merely to compel him to submit to examination as to the same points as those to which the discovery from him, by answer, was material. In *Shaw v. Wright*,¹ Lord Loughborough appears to have considered the case of *Maynard v. Pomfret* as going the whole length of proving, that though the sequestration issued as *mesne process* to compel an answer, yet it should remain if there was any duty to be performed, and to have acted upon that view.

The sequestrators under a sequestration may take all the goods and chattels in the possession of the defendant, or which they can come at without suit or action.²

With respect to *choses in action* in the hands of a third party, it seems doubtful whether they can be taken under a sequestration, without the consent of the party in whose hands they are.³ The point was discussed in *Wilson v. Metcalfe*.⁴

¹ 3 Ves. 22, and see the form of the Order, Reg. Lib. 1795, B. 652.

² The Court of Chancery can, through a sequestration, lay hold of property of every description, anywhere within its jurisdiction, belonging to a party in contempt for not obeying a decree, and it has, also, power to apply it in satisfaction. And where the delay of an attachment and sequestration would jeopard the rights of the opposite party, the latter may, in the first instance, file a fresh bill, thereby restraining the property and the party in contempt, and thus obtain the effect of the former decree. *White v. Geraerd*, 1 Edw. Ch. 336.

³ See *Hales v. Shaftoe*, 1 Sumner's Vesey, 86, Mr. Hovenden's note (2); *Dundas v. Dutens*, ib. 196, note (b), 200, Mr. Hovenden's note (2).

Mr. Hoffman in his Chancery Practice, vol. 1, pp. 157, 158, remarks, that "it is a question of great difficulty whether the sequestrators, on this process, can sequester a *chose in action*. I think it may be stated as a matter of strict authority to be the result of all the English cases, that if the party indebted or holding the *chose in action* resists, no order can be made upon him. But there is a great deal of authority, even in England, in support of the power, and the principles of our own decisions in other cases to sanction it." See the cases in notes to 1 Hoff. Ch. Pr. 158-160. In *White v. Geraerd*, 1 Edw. Ch. 340, the Vice-Chancellor observes, that "although it has sometimes been questioned, whether *choses in action* are liable to a sequestration, there can be no objection to it on principle. It is analogous to the power which this Court now constantly exercises over the equitable interests and things in action of the debtor, where a judgment at law has been recovered, and proves unavailing upon a writ of *fieri facias*. The same reason exists, for aiding the creditor by decree; and surely this Court will go as

⁴ 1 Beav. 263.

The decision of Lord Langdale in that case appears to be in conformity with that of Lord Eldon in *Francklyn v. Colhoun*,¹ and of Lord Lyndhurst in *Lord Pelham v. The Duchess of Newcastle*;² and in all those cases the *choses in action* consisted of money in the hands of a third person belonging to the party against whom the sequestration issued, and the party, in whose hands the money was, admitted the money to be in his hands, and his liability to the party. Thus, in *Francklyn v. Colhoun*,³ the person, in whose hands the money was, had admitted his liability by filing a bill of interpleader. The result of the cases appears to be, that where a *chose in action* is in the hands of a third party, who is willing to abide by the order of the Court, or who admits it to belong to the party against whom the sequestration has issued, the Court will consider it liable to the sequestration, and will order it to be paid into Court; the difficulty with regard to the effect of a sequestration upon a *chose in action* arises where the individual, in whose hands it is, disputes either the amount or the title of the party whose property is sequestered, as to the manner in which the sequestration is to be made available to reach such property. That the Court cannot, in such a case, make an order upon an unwilling party is clear from the cases above referred to.⁴

It is to be observed, that a pension from the Crown may be sequestered,⁵ but that the half-pay of an officer in the army or navy cannot be either assigned or attached.⁶ This distinction arises from principles of public policy, which considers half-pay as in-

far in that case as in the other, in order to compel satisfaction out of a species of property which cannot be reached by ordinary execution."

In *Grew v. Breed*, 12 Metcalf, 363, Wilde J. said: "The objection is, that a *chose in action* is not subject to the process of sequestration. But on examining the English authorities we do not find it so settled." He then refers to the cases cited in the text, and says: "The doctrine maintained by these cases seems to us well founded upon principle; and it is sustained in the case of *White v. Geraerd*, 1 Edw. Ch. 336, and in *Devoe v. Ithaca & Oswego R. R. Co.* 5 Paige, 211." See also *Hosack v. Rogers*, 11 Paige, 603; *Angell & Ames Corp.* § 670, note.

¹ 3 Swanst. 276.

² 3 Swanst. 290, n.; and see *Johnson v. Chippendall*, 2 Sim. 55.

³ *Ubi supra*.

⁴ For further information, see *Simmonds v. Lord Kinnaird*, 4 Ves. 735, where the entire cases are collected.

⁵ *M'Carthy v. Goold*, 1 Ball & B. 387.

⁶ *Ibid.* See also *Stone v. Lidderdale*, 2 Anst. 533; *Collyer v. Fallon*, 1 T. & R. 459.

tended to provide decent maintenance for experienced officers, both as a reward for their past services, and to enable them to preserve such a situation that they may be always ready to return into actual service.¹

The question, whether the commissioners under a writ of sequestration upon *mesne process* can seize the books and papers of a corporation, was discussed in *Lowten v. The Mayor of Colchester*,² but was not decided, although Lord Eldon expressed strong doubts as to the existence of such a power.

It appears from the last-mentioned case, that Lord Eldon was of opinion sequestrators have the power of breaking open doors in the execution of their duty ; and in *Lord Pelham v. The Duchess of Newcastle*,³ Lord Thurlow allowed the sequestrators to open boxes and rooms that were locked, if the keys were denied them, and to schedule the goods in them, but to remove nothing from the house without the special order of the Court.

The latter part of the order in the above case, which prohibits the sequestrators from removing anything from the house, is consistent with the ordinary practice of the Court, which, considering goods taken upon sequestrations on *mesne process* as in the nature of a pledge to answer the contempt, merely gives the sequestrators power to take the property from the defendant, and to prevent his enjoyment of it till he has cleared his contempt. And it seems that if the sequestrators take upon themselves to remove the defendant's property, they will be liable to an attachment.⁴

If under a sequestration a sale is wanted, application should be made to the Court for permission to sell ; but an order for the sale of goods taken upon *mesne process* has scarcely ever been made, unless for the purpose of raising money to pay the expenses of the sequestration, or where the goods are of a perishable nature, such as rents paid in kind, or the natural produce of a farm ;⁵ and probably now sequestrations on *mesne process* will become obsolete, with the facilities given for obtaining appearance and dispensing with answers.

In the case, however, of sequestrations to enforce decrees or

¹ Ibid., and see *Spooner v. Payne*, 1 De G. Mac. & G. 383.

² 2 Mer. 395.

³ 3 Swanst. 290, note.

⁴ *Desbrow v. Crommie*, Bunb. 272 ; *Hales v. Shaftoe*, 1 Ves. jr. 86.

⁵ *Shaw v. Wright*, 3 Ves. 22 ; *Wilcocks v. Wilcocks*, Amb. 421.

orders, it seems that the Court will not confine the order for a sale to goods of a perishable nature ; but under such sequestrations, the Court will direct the sale not only of perishable commodities, but of goods, such as rents paid in kind, or the natural produce of a farm,¹ or household goods and furniture.²

The Court will not sell terms of years, or leasehold estates, or any subject which passes by title and not by delivery, although it will direct the profits to be applied ; because sequestrators can give no warranty for title, the property not being vested in them.³ It is to be noticed, that sequestrators cannot proceed to a sale without an order, upon petition or motion, of which notice must be given.⁴

The application for a sale may be made either by motion or by petition upon notice.⁵

Besides the effect which a sequestration has upon the goods and chattels of the defendant, the writ, as we have seen, authorizes the sequestrators to enter upon all messuages, lands, tenements, and real estates, and to collect, take, and get into their hands the rents and profits thereof.

Under this authority the sequestrators may enter into the possession of such parts of the defendant's real estate as are in his own occupation, whether freehold or copyhold.⁶ They may also enter into the receipt of the rents and profits of such estates as are in the occupation of tenants.⁷

The sequestrators, upon entering upon a defendant's estate, should serve the tenants in possession with a notice in writing to attorn and pay their arrears and growing rents to them, which may

¹ *Shaw v. Wright*, 3 Ves. 22.

² *Mitchell v. Draper*, 9 Ves. 208 ; *Cane v. Smith*, 3 Bro. C. C. 362.

³ *Ibid.* ; *Sutton v. Stone*, 1 Dick. 107.

⁴ *Mitchell v. Draper*, 9 Ves. 208.

⁵ *Ibid.* ; *Wilcocks v. Wilcocks*, Amb. 421.

⁶ 1 Barnard. 431 ; *Coulston v. Gardiner*, 2 Cha. Ca. 76 ; 3 Swanst. 279, n. S. C. In *The Marquis of Caermarthen v. Hawson*, the Court of Exchequer appears to have doubted whether they could revive a sequestration against the heir to copyhold lands, on account of the difficulty of compelling the lord to admit the sequestrators, and also by reason of the lord's right to the fine, &c., 3 Swanst. 398, n.

⁷ But the suing out of a sequestration on a case does not operate as a transfer of title. *Coats v. Elliott*, 23 Texas, 606.

be done either personally, by the person serving the tenant, and at the same time showing him the sequestration under seal, or by leaving the notice at his dwelling-house with some of his family, together with a copy of the sequestration, and showing the original writ to the person served.¹

If the tenant refuse to attorn, the proper course appears to be to cause the sequestrator, before the motion is made, to make a return of the names of the tenants, and of their refusal to attorn, and then to move, *upon notice to the tenants*, that they may be ordered to attorn and pay their rents to the sequestrators.² This order should be made upon the tenants by name, and not upon the tenants of the defendant generally.³

We have seen before, that sequestrators may take possession of lands in the defendant's own occupation. It seems also, that where the sequestration is for the non-performance of a decree, the Court will, upon proper application, give them authority to set and let the property ;⁴ but no such authority will be given where the sequestration is upon *mesne process*.⁵

A fraudulent alienation of property will not prevent the effect of a sequestration ;⁶ and where upon a motion for a writ of assistance to enforce an injunction to put sequestrators into possession of the house and goods of the defendant, the defendant alleged that he had assigned the house and goods to A. B. for a valuable consideration, it was ordered that A. B. should be examined *pro interesse suo*, unless he showed cause to the contrary at the next seal.⁷

Sequestrators are accountable for all that they receive, and are bound from time to time to make returns to the Court of what comes to their hands under the sequestration.⁸

Where the sequestration is for non-performance of a decree, the

¹ See *Shaw v. Wright*, Reg. Lib. 1795, B.

² 4 Ves. 738 ; 3 Swanst. 306, n. (b) ; see also Anon. 2 Cha. Ca. 163.

³ Anon. 2 Cha. Ca. 163.

⁴ *Neale v. Bealing*, 3 Swanst. 304, n. (c) ; *Harvey v. Harvey*, 2 Cha. Rep. 49.

⁵ *Ray v. —*, 3 Swanst. 306, n. (a).

⁶ *Coulston v. Gardiner*, 2 Cha. Ca. 43 ; 3 Swanst. 279, n. S. C. ; *Witham v. Bland*, ib. 277, n. (a) ; *Bird v. Littlehales*, ib. 299, n. (a) ; *Hamblyn v. Ley*, ib. 301, n. (a).

⁷ *Bird v. Littlehales*, *ubi supra*.

⁸ *Desbrow v. Crommie*, Bunb. 272 ; *Howell v. Lord Coningsby*, 1 Fowl. Ex. Pr. 161.

proceeds are applicable to the payment of the demand,¹ but the sequestrators ought not so to apply them of their own authority ; they ought to bring the money arising from the payment of rent or otherwise into Court, which they may obtain leave to do by petition or motion, and the party under the decree, who is desirous of having the sequestered property applied in satisfaction of his demand, must apply to the Court for that purpose.²

It appears that the Court will direct a writ of assistance to issue, for the purpose of putting sequestrators into possession.³

It is clearly a contempt of the Court to disturb sequestrators in their possession of property taken under the sequestration ;⁴ and where sequestrators have been forcibly dispossessed, the Court will award an injunction to compel the restitution to them of that of which they have been dispossessed.⁵

With respect to the time from which lands are considered to be bound by a sequestration, so as to affect a conveyance *pendente lite*, the rule appears to be, that where the lands or the profits of lands are the subject of the suit, the title is bound from the filing of the bill, and every purchaser *pendente lite* comes in at his peril, even though he paid a *bonâ fide* consideration ;⁶ but where the suit is for a personal demand, the land is not liable till sequestration ;⁷ and so where an account of profits is decreed against a trustee of land, by way of execution of a trust ; there *the person only* is charged for breach of trust in not applying the profits, and the land is not charged but while in the hands of the trustee, nor then

¹ Davis *v.* Davis, 2 Atk. 24.

² 1 Nev. & Man. 386.

³ See Seton on Decrees, 633.

⁴ Angel *v.* Smith, 9 Ves. 336 ; Lord Pelham *v.* The Duchess of Newcastle, 3 Swanst. 290, n.

⁵ See Brown *v.* Cuffe, 1 Hogan, 145. In Valentine *v.* Teller, 1 Hopk. 422, it was held, that there is no sufficient reason for the injunction. The writ of assistance is to be considered as the only necessary process of the Court, for giving possession of land, which has been the subject of adjudication. See Ludlow *v.* Lansing, 1 Hopk. 231 ; Kershaw *v.* Thompson, 4 John. Ch. 609 ; Wallen *v.* Williams, 7 Cranch, 602 ; Garretson *v.* Cole, 1 Har. & John. 370 ; Devaucene *v.* Devaucene, 1 Edw. Ch. 272 ; Buffum's Case, 13 N. Hamp. 14.

⁶ Crofts *v.* Oldfield, 3 Swanst. 278, n. ; Bird *v.* Littlehales, ib. 299 ; Self *v.* Madox, 1 Vern. 459. See Atlas Bank *v.* Nahant Bank, 23 Pick. 489, 490 ; Gregory *v.* Haynes, 13 Cal. 591.

⁷ Bird *v.* Littlehales, *ubi supra* ; Hamblyn *v.* Ley, ib. 301, n. ; 1 Dick. 94, S. C. ; and see Coulston *v.* Gardiner, ib. 279, n.

neither till sequestration issued, so that purchasers before sequestration are free.¹ It is to be observed, however, that even where lands are collaterally charged by a sequestration, as in the latter case, a voluntary conveyance, executed before the sequestration issued for the purpose of defeating it, will not have that effect;² and that, in *Witham v. Bland*, where a personal decree had been made against the father, upon which a sequestration issued, Lord Nottingham revived the sequestration against the son, who was also the heir; because he did not claim as heir, but under a voluntary conveyance, executed before the sequestration, to defeat the decree.³

With reference to this subject it is to be remarked, that a sequestration binds from the time of awarding it, and not from the time of executing it, or of its being laid on by the commissioners,⁴ and that it affects copyhold as well as freehold lands.⁵

The proper course to be pursued by any person who claims title to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration, appears to be to apply to the Court to direct the plaintiff to exhibit interrogatories, in order that the party applying may be examined as to his title to the estate.⁶

An examination of this sort is called an examination *pro interesse suo*, and an order for such an examination may be obtained by a party interested, as well where the property consists of goods and chattels or personalty, as where it is real estate.⁷ Thus, in *Martin v. Willis*,⁸ a person claiming title to goods seized under a

¹ *Crofts v. Oldfield*, *ubi supra*.

² *Coulston v. Gardiner*, *ubi supra*; *Bird v. Littlehales*, *ubi supra*; *Hamblyn v. Ley*, 3 Swanst. 301; and see *Witham v. Bland*, 3 Swanst. 276, n.; *Langley v. Bredon*, cited 3 Swanst. 284, n.

³ See *Johnson v. Chippindall*, 2 Sim. 55, where a release by a grantee of an annuity to the grantor after sequestration was held to be good.

⁴ *Burdett v. Rockley*, 1 Vern. 58.

⁵ *Coulston v. Gardiner*, *ubi supra*; see also *Marquis of Caermarthen v. Hawson*, 3 Swanst. 294, n.

⁶ The mode of proceeding is the same where the property is in the possession of a receiver, *Anon.* 6 Ves. 287; *Angel v. Smith*, 9 Ves. 336; *Brooks v. Greathead*, 1 J. & W. 178; *Russell v. The East Anglian Railway Company*, 3 Mac. & G. 104.

⁷ *Lord Pelham v. The Duchess of Newcastle*, 3 Swanst. 290, n.

⁸ In *Seacc.* 10 May, 1754. See 1 Fowl. Ex. Pr. 160, where it is stated that this order was directed by the Court to be made, similar to that in *Mackenzie v. The Marquis of Powis*, 6 July, 1739, which was settled by the Court.

sequestration, obtained an order that the party prosecuting it might exhibit interrogatories against him to examine him *pro interesse suo*, and in the mean time that the goods might be restored to him on his giving security.

An order for the examination of a party *pro interesse suo* may be obtained as a matter of course by the party claiming,¹ but it cannot be granted till after the sequestrators have made a return, because, till then, it cannot appear to the Court what is sequestered.²

The application may be made either by motion or petition.³

It may be doubted whether a plaintiff can compel a claimant to be examined *pro interesse suo*.⁴ But in *Bird v. Littlehales*,⁵ an order was made for a person to be examined *pro interesse suo*, on the application of the plaintiff, and similar orders were pronounced in *Hamlyn v. Lee*,⁶ and in *Johnes v. Claughton*.⁷ In the two last cases the parties claiming the property had commenced ejectments to recover the possession of it, and it formed part of the orders that they should be restrained from proceeding in such actions;⁸ but in *Bird v. Littlehales* no ejectment had been commenced, but the order was made in consequence of the defendant's counsel having stated, in answer to an application for a writ of assistance, that the defendant had assigned the property for a valuable consideration to A. B., whereupon the Court directed that A. B. should be examined *pro interesse suo*, unless he showed cause to the contrary.⁹

From the above cases of *Hamlyn v. Lee*, and *Johnes v. Claughton*, it appears that where sequestrators or a receiver are in possession of property belonging to a defendant, and a party claiming that property adversely to the defendant brings an action of ejectment against the sequestrators or receiver, for the purpose of enforcing his claim, the Court will interfere by injunction to prevent the party claiming from proceeding with the ejectment; for al-

¹ *Lord Pelham v. The Duchess of Newcastle*, 3 Swanst. 290.

² *Ibid.*

³ *Hunt v. Priest*, 2 Dick. 540.

⁴ *Kaye v. Cunningham*, 5 Mad. 406; *Hawkins v. Gathercole*, 1 Drew. 12.

⁵ 3 Swanst. 299, 300, n. (a).

⁶ *Ston on Decrees*, 413.

⁷ *Jac.* 573.

⁸ See the case of *Crow v. Wood*, 13 Beav. 271.

⁹ *Reg. Lib. A.* 1742, fo. 187.

though the Court will sometimes permit the party to proceed at Law against the sequestrators or receiver, where a matter is in a fit state for the right to be ascertained by a trial at Law,¹ such a proceeding cannot be adopted unless the permission of the Court has been first obtained. This was settled in *Angel v. Smith*,² where the rule was laid down, both with respect to receivers and sequestrators, that their possession is not to be disturbed without leave.³

It has sometimes happened that where a party claiming a legal right to property sequestered has made an application to be examined *pro interesse suo*, the Court, instead of the order prayed, has given the party leave to try his title at Law, either by ejectment or in such other manner as may be necessary, for the purpose of deciding the point;⁴ and sometimes the Court, without directing either an examination *pro interesse suo* or a trial at Law, has at once inquired whether the party claiming is entitled to any interest in the property; and where the right of the party has been clear and undisputed, the Court has at once made the order in his behalf.⁵

But, in general, where personal property belonging to a third person has been sequestered, the Court will not make an order for its restoration upon affidavit, but will direct the party to be examined *pro interesse suo*;⁶ the Court has, however, ordered the possession of the property claimed to be delivered up to the claimant, upon his entering into good and sufficient security to restore it in case the decision upon his claim should be against him.⁷ In the case of *Empringham v. Short*,⁸ the sequestrator took possession of property which was claimed by a third person, and Sir J. Wigram, V. C., had thereupon occasion to investigate the practice of the Court in trying the rights of parties under sequestrations.

¹ *Attorney-General v. Mayor of Coventry*, 1 P. Wms. 308; *Anon.* 6 Ves. 288; *Angel v. Smith*, 9 Ves. 335.

² *Ubi supra*.

³ *Brooks v. Greathed*, 1 J. & W. 178; *Russell v. The East Anglian Railway Company*, 3 M. & G. 104; *Crow v. Wood*, 13 Beav. 271.

⁴ *Attorney-General v. Mayor of Coventry*, 1 P. Wms. 308; *Walker v. Bell*, 2 Mad. 21; Reg. Lib. 1814, B. 1349 (b).

⁵ *Dixon v. Smith*, 1 Swanst. 457; see also *Dickinson v. Smith*, 4 Mad. 177; *Attorney-General v. Mayor of Coventry*, 1 P. Wms. 308.

⁶ *Lord Pelham v. The Duchess of Newcastle*, 3 Swanst. 290, n.

⁷ *Wharam v. Broughton*, 1 Ves. 180.

⁸ 3 Hare, 461.

He came to the conclusion, that it is perfectly clear that in such cases the Court exercises a discretion. "Where the case has been considered to admit of no doubt, the Court has determined it without further inquiry. In some cases the Court has ordered the parties to bring an ejectment; in other cases, where the sequestrator has found a person in possession of the property, the Court has ordered a writ of assistance to issue, unless the party submitted to come in and be examined *pro interesse suo*. The Court sees what is necessary to be done in order to try a question of right, and it then puts it in the way of trial." In the case before him, he determined that the proper mode of trying the question was by an issue, which was accordingly directed.

An infant may be admitted to be examined *pro interesse suo* by guardian;¹ and, as we have seen, a person may be admitted to make out his claim by means of such an examination *in formâ pauperis*,² according to the practice before the abolition of the Master's office.

In the order for the plaintiff to examine a party *pro interesse suo*, there was a time limited within which the interrogatories must be exhibited.³ The interrogatories were formerly settled by the Master.⁴

When the examination was put in, the plaintiff, if he disputed its truth, might reply to it. If it was not replied to it was conclusive,⁵ and the claimant might then apply for a reference to look into the interrogatories and the examination, and to certify whether the claimant had made out a title or not.⁶

If the examination was replied to, leave was given to either party to examine witnesses, upon motion, without notice.⁷ This

¹ Lord Pelham v. The Duchess of Newcastle, 3 Swanst. 290, n.

² Ante, p. 34.

³ Hunt v. Priest, 2 Dick. 540. It is presumed that if the interrogatories are not exhibited within the time specified, the Court will, upon application, suspend the sequestration as far as relates to the interest of the claimant.

⁴ Bowles v. Parsons, 1 Dick. 142; Cooper v. Thornton, *ibid.* 72.

⁵ Attorney-General v. The Mayor of Coventry, 3 Swanst. 311, n.

⁶ Hamlyn v. Lee; Seton on Decrees, 415; 1 Dick. 94, S. C.; 3 Swanst. 301, S. C.; Bowles v. Parsons, 1 Dick. 143. In Fawcett v. Fothergill, 1 Dick. 19, it appears that, after a reference made to the Master to certify what proof the claimants had made of their right, upon which the Master had reported, the Court, upon the report coming on to be heard, ordered the plaintiff to reply to the examination.

⁷ Rowley v. Ridley, 3 Swanst. 308, n.

practice, with very few alterations, would probably now be adopted in the Judge's chambers.

When it appears that a party who has been examined *pro interesse suo* has a plain title to the property, and is not affected by the sequestration, then it is to be discharged against him, with or without costs, as the Court shall determine upon the circumstances of the case.¹

A sequestration on *mesne process*, like other processes of contempt, may be discharged upon the party clearing his contempt and paying the costs incidental thereto;² but if the bill has been taken *pro confesso* and a decree made *ad computandum*, the Court will not discharge the sequestration on payment of the costs of the contempt only, but will keep it on foot as a security to the plaintiff for the defendant's accounting:³ whether it can, in such case, be made the means of enforcing the payment of the final balance, by the plaintiff's presenting a petition (to come on with the cause for further directions), that the sequestrators may account and pay the balance in their hands into Court, has been before discussed.⁴

Where sequestrators are in the possession of lands or tenements in question in the cause, the appointment of a receiver of the rents and profits of those lands will have the effect of discharging the sequestration.⁵

A sequestration against a defendant upon *mesne process* abates on the death of the plaintiff, but it is revived with the suit;⁶ and the Court will not, immediately upon the abatement, turn the sequestrators out of possession, but will give time for the revival of the suit.⁷

Where the defendant himself against whom the sequestration has issued dies, the process, being personal, not only abates but falls altogether, and cannot be revived; though it is otherwise where it has issued for non-performance of a decree;⁸ there the sequestration is merely abated with the suit, and being in the

¹ Gilb. For. Rom. 81.

² 1 Turn. & V. 124.

³ Ante, p. 1067.

⁴ Ante, p. 1066; and see *Heyn v. Heyn*, Jac. 49.

⁵ Ibid.

⁶ *Hyde v. Forster*, 1 Dick. 132.

⁷ Per Lord Hardwicke in *White v. Hayward*, 2 Ves. 461.

⁸ *Hawkins v. Crook*, 3 Atk. 594.

nature of an execution it may be revived against the personal representative of the party.¹

It seems, however, that where the decree is for a mere personal demand, the sequestration can only be revived against the personal representative, and that it cannot be revived against the heir,² unless the decree is for a covenant in which the heir is bound, or for the land itself, unless the land descends to an heir in tail,³ or to a purchaser; in which case, of course, the land ceases to be bound, unless it has been entailed or conveyed away, subsequently to the decree, or with the view of avoiding the effect of the sequestration.⁴

It is to be observed, that a sequestration against the lands of a married man will not bind his wife's dower after his death, even though the marriage took place after the sequestration issued;⁵ and where a sequestration was awarded to sequester a manor and other real estate belonging to a defendant, to satisfy a decree, out of which manor an annuity was secured to the defendant's wife, which, together with the manor, had been sequestered during the husband's life, upon the application of the wife, after the defendant's death, the sequestration was discharged, as far as respected the annuity.⁶

A sequestration will not go or be revived against an heir on the death of the ancestor, unless the suit be revived;⁷ and it is to be noticed that, in such case, the suit must be revived against the *heir*; and that a revivor against the personal representative alone will not warrant the revivor of the sequestration against the heir.⁸

The proper course, where there is an abatement of the suit by the death of the plaintiff, appears to be, for the party whose property is sequestered, to move that the representative of the plaintiff

¹ Ibid. 593; *Burdett v. Rockley*, 1 Vern. 58; *University College v. Foxcroft*, ibid. 166; *Wharam v. Broughton*, *ubi supra*; *White v. Hayward*, 2 Ves. 464; *Hyde v. Greenhill*, 1 Dick. 106.

² *Burdett v. Rockley*, *University College v. Foxcroft*, *Wharam v. Broughton*, and *Hyde v. Greenhill*, *ubi supra*; *Marquis of Caermarthen v. Hawson*, 3 Swanst. 294, n.

³ *Earl of Athol v. Earl of Derby*, 1 Cha. Ca. 220.

⁴ Ante, p. 1072.

⁵ *Burdett v. Rockley*, 1 Vern. 118.

⁶ *Proctor v. Reynol*, 1 Cha. Rep. 247; *Langley v. Breydon*, cited 2 Cha. Ca. 46.

⁷ *Derby v. Ancram*, cited 2 Cha. Ca. 46.

⁸ See *Burdett v. Rockley*, 1 Vern. 58, ed. Raithby, *notis*.

may revive the suit within a given time, or else that the sequestration may be removed.¹ It seems, however, that where sequestration is upon real estate, and the party in default dies, but the plaintiff does not revive the suit against the real representative, the person claiming the land may proceed by ejectment to recover possession of it, and that the Court will not restrain him.²

Where, however, a sequestration is in force, or has been revived, a party claiming an interest in the property sequestered ought not to proceed by ejectment or other action to recover it, but should apply to the Court to be examined *pro interesse suo*.³

Sequestrators will be ordered, upon petition or motion, to account for their receipts under the sequestration.⁴

Where a sequestrator abuses his power, the Court will, upon representation of the facts, make an order that he shall show cause on a particular day why he should not be committed and pay the costs to the party complaining.⁵

The costs of a sequestration are not liquidated, but are costs to be taxed. Sometimes the sequestrators have been allowed a poundage, and sometimes, under circumstances of trouble and expense, a specific sum *in solido*.⁶

In cases where a decree is made *pro confesso* under the Orders of May, 1845, the Court is now expressly enabled to direct a sequestration of the real and personal estate of the defendant to be issued, and to direct payment to be made out of such real or personal estate of such sum or sums of money as at the hearing, or any subsequent stage of the cause, the plaintiff appears to be entitled to.⁷

It may here be remarked, that the process which has hitherto been considered as applicable against parties to the record, may also be resorted to for the purpose of compelling the obedience of persons not parties.⁸ By the 15th of the Orders of August, 1841,

¹ See *White v. Hayward*, 2 Ves. 462.

² *Burdett v. Rockley*, 1 Vern. 58, ed. Raithby, *notis*; Reg. Lib. 1681, A. 671, 1682, A. 184.

³ Ante, p. 1073.

⁴ *Keene v. Price*, 1 S. & S. 98.

⁵ *Lord Pelham v. Lord Harley*, 3 Swanst. 291, n.

⁶ 1 Turn. & V. 125; *Wood v. Freeman*, 2 Atk. 542.

⁷ Ante, p. 507.

⁸ Purchasers, under decrees in Chancery, are regarded to a certain extent as parties to the suit, so as to be under the control of the Court on the one hand,

it is provided, "That every person not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause; and every person not being a party in any cause against whom obedience to any order of the Court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party to the cause."

It has been decided upon this Order, that a person not a party to a cause, who has obtained an order that his solicitor shall deliver his bill of costs, may enforce obedience thereto by the writ of attachment, instead of the four-day order.¹

The process of contempt, which has been before described, is well adapted to the purpose of compelling a party to pay money, or to perform any pecuniary obligation, which he may have been directed to pay or perform by the decree or order of the Court; for, after having arrested him under any of the preceding processes, it is in the power of the party issuing it to obtain the payment of the money, or the performance of the obligation, by sequestering the defendant's property, and applying the proceeds in discharge of the demand; it is not, however, equally well adapted to enforce obedience to a decree, directing the party to do some other act, such as the execution of deeds, or the delivery up of documents; for it is obvious that where a person is obstinately determined not to do the act required (and cases of such instances have frequently occurred), and to submit to the consequences of his contempt by lying in prison, debarred by the operation of a sequestration from the enjoyment of his property, no power is

and its protection on the other. Thus, a purchaser under an order or decree in Chancery may be compelled to complete his purchase by order on him in a summary way, without a bill, to pay or bring the money into Court. *Richardson v. Jones*, 3 Gill & John. 164; *Gordon v. Sims*, 2 McCord Ch. 165; *Brown v. Wallace*, 4 Gill & John. 479; *Dunham v. Minard*, 4 Paige, 441; *Morris v. Mowatt*, 2 Paige, 586; *Anderson v. Foulke*, 2 Har. & Gill, 346; *Wood v. Mann*, 3 Sumner, 318. And on the other hand, parties to the suit and all parties coming in under the decree, as well as all who do not claim to hold by title paramount to the parties, will be enjoined from disturbing the purchaser. *Stackpole v. Curtis*, 2 Molloy, 504; *Dorsey v. Campbell*, 1 Bland, 363; *McComb v. Kankey*, 1 Bland, 363; *Chapline v. Chapline*, 1 Bland, 364; *Wright v. Wright*, 1 Bland, 365; *Taylor v. Colgate*, 1 Bland, 365.

¹ *Lane v. Oliver*, 2 Hare, 97; and see *Ex parte Van Sandau*, 1 Ph. 605.

afforded by the ordinary process of contempt, by which the other party can procure that to be done which the Court directs should be performed.

To meet this evil it was, by the 1 Will. IV. c. 36, s. 15, r. 15, enacted, "That when any person shall have been directed, by any decree or order, to execute any deed or other instrument, or make a surrender or transfer, or *to levy a fine or suffer a recovery*, and shall have refused or neglected to execute, make or transfer, or *levy or suffer* the same, and shall have been committed to prison under process for such contempt, or, being confined in prison for any other cause, shall have been charged with or detained under process for such contempt, and shall remain in such prison, the Court may, upon motion or petition, and upon affidavit that such person has, after the expiration of two calendar months from the time of his being committed under, or charged with, or detained under such process, again refused to execute such deed or instrument, or make such surrender or transfer, or *levy or suffer such fine or recovery*, order or appoint one of the Masters in Ordinary, or if the act is to be done out of London, then, if necessary, one of the Masters Extraordinary, to execute such deed or other instrument, or to make such surrender or transfer, for and in the name of such person, and *to levy such fine or suffer such recovery*, in his name, and *to do all acts necessary to give validity and operation to such fine and recovery, and to lead or declare the uses thereof*; and the execution of the said deed or other instrument, and the surrender or transfer made by the said Master, and *the fine or recovery levied or suffered by him*, shall in all respects have the same force and validity as if the same had been executed or made, *levied or suffered*, by the party himself; and within ten days after the execution or making of any such deed or other instrument or surrender or transfer, or levying or suffering such fine or recovery, notice thereof shall be given by the adverse solicitor to the party in whose name the same is executed or made; and such party, as soon as the deed or other instrument or surrender, transfer, *fine or recovery*, shall be executed, made, levied or suffered, shall be considered as having cleared his contempt, except as far as regards the payment of the costs of the contempt, and shall be entitled to be discharged therefrom, under any of the provisions of the said Act applicable to his case; and the Court shall make such order as shall be just, touching the payment of the costs,

of or attending any such deed, surrender, instrument, transfer, *fine, or recovery*.

A more effectual remedy has however been given by the Trustee Act, 1850, under which, in such cases, an order may be obtained, vesting the estate of the contumacious defendant according to the order of the Court.¹

Moreover, a more summary method may be pursued by a party to whom possession of an estate has been ordered by a decree or order to be delivered, that is, by means of a writ of assistance, directed to the sheriff of the county where the property lies, commanding him to put the plaintiff into the possession of the premises in question, pursuant to the decree.²

The Orders of August, 1841, have now rendered service of a writ of execution no longer necessary as a foundation for the writ of assistance, so that hereafter, by the combined operation of the statute and the Orders, a writ of assistance may be obtained upon service of the decree, without either an injunction or a writ of ex-

¹ And see *Wellesley v. Wellesley*, 4 De G., M. & G. 537. A decree for a deed, in Ohio, operates as a conveyance, subject as between the parties, to a revesting of the title by a reversal of the decree; but such a reversal does not affect the title of a purchaser acquired *bona fide*, while the decree was in force. *Taylor v. Boyd*, 3 Ohio, 337. Such decree need not be recorded in the Registry of Deeds. *Bennett v. Williams*, 5 Ohio, 461. A decree for the execution of a deed may still be enforced by attachment, notwithstanding the statute making such decree operates as a conveyance. *Randall v. Pryor*, 4 Ohio, 424. A decree for a deed, in the Circuit Court of the United States, does not operate as a conveyance in Ohio. The actual execution of a deed has to be enforced in that Court by attachment and sequestration, as in England. *Shepherd v. Ross County*, 7 Ohio, 271; ante, 797, note.

In Mississippi, the title cannot be passed by a decree; conveyances must be made under it by the party, or by a commissioner. *Wallace v. Wilson*, 34 Miss. (5 George,) 357.

In Connecticut, Courts of Equity are authorized by statute to "pass the title to real estate by decree, without any act on the part of the defendant, when in their judgment it shall be the proper mode to carry the decree into effect"; and such decree, having been duly recorded, "shall, while in force, be as effectual to transfer the same as the deed of the defendant." Rev. Stat. tit. 12, § 22; *King v. Bill*, 28 Conn. 598.

² It seems that, instead of a writ of assistance, the Court has sometimes issued a commission to Justices of the Peace to put the plaintiff into possession; see *Curs. Canc.* 371, or a commission of a similar nature to the sheriff; *ib.* 272. In Massachusetts, by statute, the Court may issue writs of seisin and execution in common form, when such process appears to be an appropriate method of enforcing a decree in Equity. Genl. Sts. c. 113, § 23.

ecution, having previously issued. The 13th of these Orders is in the following terms, "That upon due service of a decree or order for delivery of possession, and upon proof made of demand or refusal to obey such order, the party prosecuting the same shall be entitled to an order for a writ of assistance."¹

It may be observed, that a party is entitled to a writ of assistance, notwithstanding the decree is drawn up in the form prescribed by the 12th Order of August, 1841, giving notice of a different kind of process,² but it appears that this process is not applicable except in the case of a suit regularly instituted.³

Where the party to perform a decree is a peer of Parliament, or otherwise entitled to the privilege of peerage, or a member of the House of Commons, he cannot, any more than in the case of *mesne process*, be proceeded against by attachment, or any of those processes which require his arrest; the only method of making him answerable for his contempt, in not obeying the writ of execution, is by the same process that is resorted to in the case of his contempt by not obeying the writ of subpœna, viz., by sequestration of his property and effects.

To obtain this process in the case of a peer or member of the Commons House of Parliament, the proper course is to obtain an order for a sequestration against him *nisi*, which may be done on motion, upon producing an affidavit of service of the writ of execution, under seal, and of the non-performance of the act

¹ This order is substantially adopted in the 9th Equity Rule of the United States Courts. A writ of assistance is, in ordinary cases, the first and only process for giving possession of land, under the adjudication of the Court. *Valentine v. Teller*, 1 Hopk. 422. Where a decree has set aside a deed conveying real estate, and directed the defendants to reconvey to the plaintiff and to deliver up possession, which they had made default in doing, the Court ordered a writ of assistance, upon production of notice of motion, and affidavit of personal service of a copy thereof, and of the other papers, a certified copy of the decree, a certificate of its enrolment, a deed of reconveyance approved of by a Master, and an affidavit showing a demand of possession and execution of the deed of reconveyance, and a refusal to do either. *Devaucene v. Devaucene*, 1 Edw. Ch. 272. An injunction is not necessary, before a writ of assistance. *Valentine v. Teller*, 1 Hopk. 422. See *Van Hook v. Throckmorton*, 8 Paige, 33.

² *Bower v. Cooper*, 2 Hare, 412.

³ *Re Blake*, 10 Jur. 168.

required.¹ It appears, however, that, in such cases, previous notice of the motion must be given.²

The order *nisi* for a sequestration being drawn up, passed and entered, must be served personally in the same manner as a similar order in *mesne process*, unless the case happens to be one of those in which, as we have seen, personal service will be dispensed with, and substituted service directed.³ It seems that, where there has been a due service of the original writ upon a person entitled to the privilege of peerage in England, and afterwards he goes into another country (*viz.* Scotland), personal service of the order *nisi* upon him there will be good.⁴

The order *nisi*, for a sequestration against a peer or member of Parliament, will be made absolute, upon motion or affidavit of service of the order *nisi*. With respect, however, to peers and members of Parliament, the practice of obtaining a vesting order under the Trustee Act is equally applicable.

The method of enforcing the performance of a decree or order against a corporation aggregate has been already described.⁵

¹ When the decree is to pay money to a party in person, the letter of attorney authorizing the person making the demand must be produced, and the execution of it, as well as the demand, proved by affidavit. *Crawley v. Clarke*, 3 Bro. C. C. 373.

² *Ibid.*

³ *Ante*, pp. 466, 480 *et seq.*; *Shuttleworth v. Earl of Lonsdale*, 2 Cox, 46; *Crawley v. Clarke*, *ubi supra*.

⁴ *Davidson v. The Marchioness of Hastings*, 2 Keen, 509.

⁵ *Ante*, pp. 469, 481; *Angell & Ames Corp. § 667 et seq.* and notes. With reference to corporations established for private emolument, Chancellor Bland, of Maryland, in giving judgment in *McKim v. Odom*, 3 Bland, 422, said that "evils and embarrassments must arise from a rigid adherence to the notion that such a corporation can only be forced to respond to a suit against it by *distringas* and sequestration of its property. Take the case of a turnpike road company that had refused to answer a bill in Chancery. The road itself could not be taken and closed by virtue of a *distringas* or sequestration, because that, as one of the highways of the republic, it could not, and ought not to be obstructed by any process whatever against those, whose only interest in it is the toll they are allowed to exact in consideration of keeping it in repair. Consequently, in this instance, the only method by which the Court could effectually levy upon its property, as a means of enforcing an answer, would be to appoint a sequestrator or receiver, to take the place of the company's toll-gatherer, at each gate along the whole line of the road."

CHAPTER XXVI.

PROCEEDINGS UNDER DECREES AND ORDERS.

SECTION I. — *Feigned Issues.*

It has always been the practice of the Court in certain cases, either when legal rights were involved, or where there was great difficulty in deciding upon facts, to direct the matter to be tried by a jury, in a Court of Common Law; for which purpose an action is ordered to be brought, and a feigned issue raised.¹ The

¹ In Massachusetts, "the Court may frame issues of fact to be tried by a jury, in an Equity cause, when requested by a party, and direct the same to be tried in the county where such cause is pending, at the bar of the Supreme Judicial Court or the Superior Court." Genl. Sts. c. 113, § 22. And by rule of Court, "when-ever it shall be necessary or proper to have any fact tried and determined by a jury, the Court will direct an issue for that purpose, to be framed by the parties, containing a distinct affirmation and denial of the points in question, or in such form as the Court shall order; and the issue thus formed and joined will be submitted to a jury." Rule 23 of the Rules of Practice in Chancery.

In general, according to the practice in Chancery, a cause will be brought to a formal hearing, before an issue is directed. But in a case where it was conceded, that the only material question was that of sanity, a fact peculiarly fit and suitable for a trial by jury, the Court said: "There seems to be no objection to ordering an issue, before a general hearing." *Eames v. Eames*, 16 Pick. 141; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344. See *Waterman v. Dutton*, 5 Wis. 413; *New Orleans G. L. & B. Co. v. Dudley*, 8 Paige, 452.

Such issues may be directed in Massachusetts by the Court when holden by a single Judge. *Eames v. Eames*, *ubi supra*; Genl. Sts. (Mass.) c. 113, § 6. See *Duncan v. King*, 1 Overton, 79. It was formerly held, that they should be framed and filed at a jury term, and not at a law term of the Court. *Coffin v. Easton*, 12 Cushing, 107.

But since the recent enactments in Massachusetts, which confer on the Court and on the Justices thereof full power to make and enter all decrees in Equity, either interlocutory or final, at any time, irrespective of the regular terms established by law for the transaction of business on the common law side of the Court, the Court of Chancery is always open for the direction of such issues. See *Thompson v. Goulding*, 5 Allen, 83, 84.

The ordering of an issue to a jury, being within the discretion of the presiding Judge, is not open to exception. *Ward v. Hill*, 4 Gray, 593; *Crittenden v. Field*, 8 Gray, 626.

No appeal lies from an order of the Court directing an issue, or for refusing one upon the application of either party. *Black v. Lamb*, 1 Beasley, (N. J.) 113.

practice still continues; but there are some changes which will render it of less frequent occurrence. By the Chancery Amendment Act,¹ in cases where the Court used to decline granting equitable relief until the legal title or right of the parties seeking such relief was established at Law, it may itself determine such title or right without requiring the parties to proceed at Law. Moreover, by the 39th section of the same Act, the Court is enabled, as we have seen,² to require the production and oral examination before itself of any witness or party in the cause. These provisions will in many cases prevent the necessity of directing an action or issue. The tendency also of modern times is opposed to the increased length of litigation caused by the practice.³

The attention of the reader has already been called to the circumstances under which the Court will be induced to permit such an issue for the purpose of trying a fact, positively denied by the answer, but which is supported by the evidence of *one* witness only, with corroborating circumstances.⁴ There are many other cases, however, in which issues have been directed;⁵ thus, if there is contradictory evidence,⁶ between persons who are of equal credit, and have had equal opportunities of information, and the evidence is so equally balanced on both sides, that it becomes doubtful which scale preponderates, the Court has frequently directed an issue, in order to relieve and ease its own conscience, and to be satisfied, by the verdict of a jury, of the truth or falsehood of the facts controverted.⁷

¹ 15 & 16 Vict. c. 86, § 62.

² Ante, p. 895.

³ See *Bassett v. Johnson*, 2 Green Ch. 417.

⁴ Ante, p. 840.

⁵ In New Jersey, the Court of Chancery may send issues to a jury of its own motion. *Black v. Lamb*, 1 Beasley (N. J.) 108; *Trenton Bank v. Woodruff*, 1 Green Ch. 117; *Bassett v. Johnson*, 2 Green Ch. 421, 422. See *Smith v. Croom*, 7 Florida, 180.

⁶ See *O'Brien v. Bowes*, 4 Bosw. (N. Y.) 657.

⁷ *Mad. P. & P.* 621; *Stokes v. Edmeades*, 1 M'Clel. & Y. 436; *Tappan v. Evans*, 11 N. Hamp. 311. In this case last cited, Parker C. J. said: "In a controversy about matter of fact, the Court of Chancery, if it have jurisdiction, may direct an issue, to try the fact by a jury; although a verdict is not, perhaps, indispensable, and the Court might itself find the fact. The Court directs an issue for the better information of its conscience. If fully satisfied as to the evidence, they will not send it to a trial at law. Issues are frequently directed when matters of law are mixed with matters of fact. Where the uncertainty as to the validity of

There are cases, also, where the Court has directed issues, although there was no contradictory evidence, or any matter to a title arises from questions of fact, it is most proper that they should be tried by a jury." 11 N. Hamp. 334; *Seymour v. De Lancey*, 1 Hopk. 449; *Pomeroy v. Winship*, 12 Mass. 514; *Lapresse v. Falls*, 7 Ind. 692; *Fisher v. Porch*, 2 Stockt. (N. J.) 243; *McDowell v. Bank of W. & B.* 1 Harring. 369; *Munson v. Reed*, 1 Clarke, 580; *Hood v. Marquess*, 4 Call, 416; *Townsend v. Graves*, 3 Paige, 453; *Knibb v. Dixon*, 1 Rand. 249; *Douglass v. M'Chesney*, 2 Rand. 109; *Marshall v. Thompson*, 2 Munf. 412; *Galt v. Carter*, 6 Munf. 245; *Boyd v. Hamilton*, 6 Munf. 459; *Cocke v. Upshaw*, 6 Munf. 464; *Dale v. Roosevelt*, 6 John. Ch. 355; *Miller v. Wack*, 1 Saxton (N. J.), 205; *Decker v. Coskey*, 1 Saxton (N. J.), 427; *Apthorp v. Comstock*, 2 Paige, 484; *Lee v. Beatty*, 8 Dana, 207; *Nice v. Purcell*, 1 Hen. & Munf. 372. Issues should be directed only in those cases where there is a want of evidence, or where the evidence is contradictory, or so nearly balanced as to render an open and rigid cross-examination of the witnesses before a jury necessary. *Townsend v. Graves*, 3 Paige, 453. An issue has been ordered to try a question of fraud. *Hooe v. Marquess*, 4 Call. 416. See *Stewart v. Inglehart*, 7 Gill & John. 132. So, to try whether a will, said to have been lost, was ever, in fact, executed, and if so, what were its provisions. *Brent v. Dold*, Gilmer, 211. So, to try whether a deed was duly and fairly executed. *Anon.* 1 Desaus. 124; *Pomeroy v. Winship*, 12 Mass. 514; *Dodge v. Griswold*, 12 N. Hamp. 573. So, to try the title to land before the purchaser was compelled to accept the title. *Bowman v. Middleton*, 1 Desaus. 159; *Fox v. Ford*, 5 Rich. Eq. 349. So, to try the question of the marriage of parents and the legitimacy of a child. *Vaigneur v. Kirk*, 2 Desaus. 640. So, to try the genuineness of a deed, forming a link in the chain of title, on a bill for the specific performance of a purchase of land. *Delancey v. Seymour*, 5 Cowen, 714; *S. C.* 1 Hopk. 436. So, to try whether an absolute bill of sale was intended only as a security. *Knibb v. Dixon*, 1 Rand. 249. So, to try whether the sale of a horse or other property was really intended as a shift to evade the statute against usury. *Douglass v. M'Chesney*, 2 Rand. 109. See *Ward v. Hill*, 4 Gray, 593; *New Orleans G. L. & B. Co. v. Dudley*, 8 Paige, 452. So, to try whether the testator was sane, or seriously intended the proposed will, as such, or has subsequently nullified it by a republication of a former will, or by a revocation. *Banks v. Booth*, 6 Munf. 385. So, to try the fact of a secret partnership. *Cocke v. Upshaw*, 6 Munf. 464. So, to try a claim in a creditor's suit. *Ringgold v. Jones*, 1 Bland, 89. So, to try the question of title, in partition. *Larkin v. Mann*, 2 Paige, 27. So, to try the validity of a will of real estate, where the question arose collaterally, and the heir insisted on the invalidity of the will, in his answer. *Colton v. Ross*, 2 Paige, 396. So, to try a question of usury, arising out of disputed facts, upon the determination of which, the right of the plaintiff to a decree against the defendant depended. *New Orleans G. L. and B. Co. v. Dudley*, 8 Paige, 452. So, to ascertain the damage sustained by the purchaser, by the loss of twenty-eight acres of land, recovered from him by a better title. *Smith v. Martin*, 4 Desaus. 149. So, to try whether the execution of a certain deed was an act of fraudulent preference in contemplation of bankruptcy. *Grugeon v. Gerrard*, 4 Younge & Coll. 119. The question as to

embarrass the Court, or to prevent its coming to an immediate decision upon the evidence before it; these cases, however, are principally confined to those in which the Common Law invests a party filling a particular situation with certain rights, of which it is the object of the suit to divest him. Thus, an heir at law is so far regarded by the Courts, that it is considered, that all freehold estates of which his ancestor died seised, or to which he was entitled at the time of his death, are vested in him, unless it is shown that the ordinary course of descent has been interrupted, by the ancestor having executed a will; and so strongly do Courts of Equity consider the claim of the heir, that they will not, if the heir objects to it, even where the evidence before them is such as to leave no ground for doubt upon the subject, take upon themselves to establish a will affecting real estate, without previously having the opinion of a jury upon an issue *devisavit vel non*.¹ The modern practice of executing the trusts of a will, without declaring it established, has, however, diminished the importance of this rule without in terms repealing it. In the case of a rector, his Com-

whether an assignment of a mortgage was intended as an absolute one, or as a mere authority to enable the defendant to collect, being doubtful on the evidence, the Court directed an issue in *Fisler v. Porch*, 2 Stockt. Ch. (N. J.) 243. The fact that there has been a verdict of a jury, in an ejectment suit between the same parties, and upon the same question, may be a sufficient reason for refusing to award a feigned issue, in a case where a feigned issue would otherwise have been proper. *Van Wyck v. Seward*, 6 Paige, 62. Where the amount in controversy is small, and the facts can be satisfactorily ascertained by discovery, an issue at law will not be awarded. *Garwood v. Eldridge*, 1 Green Ch. 290.

¹ Lord Fingal *v. Blake*, 1 Moll. 113; *Tucker v. Sanger*, 1 McClell. & Y. 424. See *Banks v. Booth*, 6 Munf. 385; *Van Alst v. Hunter*, 5 John. Ch. 148; *Rogers v. Rogers*, 3 Wendell, 515; *Middleton v. Sherburne*, 4 Younge & Coll. 358; *Sneed v. Ewing*, 5 J. J. Marsh. 460. An issue will be directed on satisfactory proof adduced, to try whether a will, said to be lost, was ever in fact executed, and what were its provisions. *Brent v. Dold*, Gilmer, 211. See 2 Rev. Stat. New York, 67.

In New Jersey, it is held that there is no reason for the Court submitting the question of fact, whether a will has been cancelled, or surreptitiously destroyed, to a jury, where the evidence is such as to create no embarrassing doubt in the mind of the Court, although insisted on by one of the parties to the suit. *Hildreth v. Schillinger*, 2 Stockt. Ch. (N. J.) 196.

Courts of Chancery have no original jurisdiction to try the validity of wills of personal estate. See *Rogers v. Rogers*, on appeal, 3 Wendell, 503; *Colton v. Ross*, 2 Paige, 369. And in many of the States the decision of the Courts of Probate is conclusive on the validity of wills, both of real and personal estate, and is not re-examined in any other Court. See ante, 871, note.

mon Law right to all the tithes of his parish is considered so strong, that the Court has refused to decide against it, even upon the most indubitable testimony, when the rector thought proper to insist upon having it tried by a jury.¹

But even an heir at law may, by his conduct, deprive himself of his right to an issue to try the validity of a will: as where, if the administration under the will would affect the real estate, which is subjected to the payment of debts, he at first opposes the probate in the Ecclesiastical Court and then withdraws his opposition, and stands by and allows the executors and devisees to pay away large sums of money under the will;² or where, upon a bill to perpetuate the testimony of the witnesses to the will, he does not cross-examine the witnesses, but takes his costs as a disinherited heir.³ So where he acquiesces in a will, in such a manner as would bar his possessory rights at Law, (viz. for twenty years,) and puts the party claiming under it in a worse situation than he would have been in had he disputed the will originally, he will not be entitled to an issue.⁴

It is to be remarked here, that the right of an heir at law to an issue *devisavit vel non*, applies only to cases where there is a trust for the Court to execute; in other cases, the Court would have no ground to interfere, except, perhaps, in providing that a fair trial should be had, as for instance, by putting outstanding terms aside; but where there is a trust the whole question comes properly within the jurisdiction and under the control of the Court; and, previous to establishing the will, it has always directed the issue *devisavit vel non*.

The right of an heir at law to an issue is one which he may waive; and, even in the case of an infant, if his counsel thinks it clear, from the evidence already examined, that there is no ground to dispute the will, he will be justified in declining an issue.⁵

If an adult heir at law refuse an issue, on the hearing of the cause, the Court will establish the will against him, though he did not admit the will by his answer.⁶

¹ Williams v. Price, 4 Pri. 160; Adams v. Evans, 4 Pri. 14; and see Wilmot v. Kellaby, Daniell's Exch. Rep. 116; 5 Pri. 355; Barker v. Baker, Wightw. 397.

² Pike v. Hoare, 1 Ambl. 428, 2 Eden, 182, S. C.

³ Ibid.

⁴ Tucker v. Sanger, M'Clel. 424; 1 M'Clel. & Y. 425; 13 Pri. 119.

⁵ Levy v. Levy, 3 Mad. 245.

⁶ Jackson v. Barry, 2 Cox, 225.

It will be recollected that a Court of Equity is now expressly authorized by statute to carry into execution the trusts of a will without formally establishing it. Except in the cases of an heir at law, or of a rector or vicar, who have always been held to have a right to an issue, the granting of an issue by a Court of Equity has always been a matter of discretion in the Court.¹

¹ Per Sir Thomas Plumer, M. R., *Short v. Lee*, 2 J. & W. 495; *Black v. Lamb*, 1 Beasley (N. J.), 113; *Trenton Banking Co. v. Woodruff*, 1 Green Ch. 117; *Tappan v. Evans*, 11 N. Hamp. 334; *Dale v. Roosevelt*, 6 John. Ch. 257; *Crittenden v. Field*, 8 Gray, 626; *Hill v. Ward*, 4 Gray, 593; *Waterman v. Dutton*, 5 Wis. 413.

It was held in New Hampshire, in the case of *Marston v. Brackett*, 9 N. Hamp. 336, that a *defendant*, in a bill in Chancery, has a constitutional right to have matters of fact, alleged in the bill and denied by the answer, tried by a jury, if they are material to the decision of the cause, and the application is seasonably made. At what stage of the proceedings the application must be made, in order to entitle the party to an issue, as a matter of right, was left undetermined in the above case. The above point respecting the constitutional right to a trial by jury was left undecided in *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, 367, 369. The question whether *either party* is not entitled, of right, to the trial of any issue in fact by the jury under the provision of the Constitution of New Hampshire, was left without decision in *Dodge v. Griswold*, 12 N. Hamp. 575.

In Texas either party has a right to trial of issues of fact in equity suits. *Faulk v. Faulk*, 23 Texas, 653. See Appx. 5 Rhode Is. 596. In *Ward v. Hill*, 4 Gray, 593, the Supreme Court of Massachusetts held that the ordering of an issue to a jury in an equity suit, upon the application of the plaintiff, is within the discretion of the presiding Judge, and not open to exception. So in *Crittenden v. Field*, 8 Gray, 626. In *Franklin v. Green*, 2 Allen, 522, recently decided in Massachusetts, an issue had been framed by the Court for a jury to determine, whether a certain note involved in the general controversy, had been obtained from the plaintiff by the fraud and misrepresentation of the defendant. Upon trial of the issue, the jury found that the note had been so obtained. The defendant contended that the plaintiff was entitled to no relief, because the whole evidence produced at the hearing in the suit afterwards had, showed, notwithstanding the verdict, that no fraud had been practised by which he had suffered any injury or damage. "But in this Commonwealth," Chapman J. said, "the right of trial by jury is secured by the Constitution. In suits in Equity the issues do not grow out of the pleadings, as in suits at Law, but are framed by the Court; yet in framing the issues the Court will have regard to the Constitutional provision, and will allow the parties to submit to the jury all such material facts as are proper to be decided by them; and when a verdict is rendered, and not set aside for good cause shown, it will be regarded as settling the facts in issue conclusively."

In North Carolina it has been held, that issues of fact must be decided by a jury in Equity as well as at Law, and it must appear on the face of the decree that they were so decided. *Taylor v. Person*, 1 Hawks, 298. In Georgia, Equity

But, although the granting an issue is, except in the cases above noticed, a discretionary act, a mistake in the exercise of that discretion is a just ground of appeal; ¹ and, therefore, if the Court refuses an issue, and the Court of Appeal should think that the contrary decision would have been a sounder exercise of discretion, it will rectify the order of the Court below accordingly; ²

cases are decided by a jury. *Brown v. Burke*, 22 Georgia, 574; *Mounce v. Byans*, 11 Geo. 180; *McDougald v. Dougherty*, 11 Geo. 570.

Whether the fact proposed to be tried by the jury is material or not is a question for the Court. *Charles River Bridge v. Warren Bridge*, 7 Pick. 369. The issue is to be made up under the direction of the Court. *Charles River Bridge v. Warren Bridge*, 7 Pick. 379; *Marston v. Brackett*, 9 N. Hamp. 349; post, 1099, note. In some other States, it is held, that the Chancellor may decide all questions of fact for himself. *Lee v. Beatty*, 8 Dana, 207; *Iler v. Roath*, 3 How. (Miss.) 216; *Munson v. Reed*, 1 Clarke, 580; *Nice v. Purcell*, 1 Hen. and Munf. 273; *Fornhill v. Murray*, 1 Bland, 485; *Smith v. Croom*, 7 Florida, 180; *Miller v. Wack*, Saxton (N. J.) 204; *Beekman v. Saratoga & Sche. R. R. Co.* 3 Paige, 45; *Scudder v. Trenton Delaware Falls Co.* 1 Saxton (N. J.), 694; *U. States v. Samperyac*, 1 Hemph. 118. But when any question of fact arises, which the Chancellor considers doubtful, he should refer it to a jury. Still the verdict is to satisfy the conscience of the Chancellor, and if he is not satisfied he may disregard it. *Lee v. Beatty*, *Iler v. Roath*, *ubi supra*. See also, *Munson v. Reed*, *supra*; *Garwood v. Eldridge*, 1 Green Ch. 290; *Apthorp v. Comstock*, 2 Paige, 488; *Marshall v. Thompson*, 2 Munf. 412; *Bullock v. Gordon*, 4 Munf. 450; *Galt v. Carter*, 6 Munf. 245; *Mulock v. Mulock*, 1 Edw. Ch. 14; *O'Conner v. Cooke*, 8 Sumner's Ves. 536, Perkins's notes, and cases cited; *U. States v. Samperyac*, 1 Hemp. 118; *Fisler v. Porch*, 2 Stockt. (N. J.) 243; *Hall v. Layton*, 10 Texas, 55. The Chancellor is not bound under the Statutes of Delaware, to direct an issue to be tried at law, unless the points in controversy involve the merits of the cause. *Waters v. Comly*, 3 Harring. 117.

¹ So held in *Townsend v. Graves*, 3 Paige, 457; *Belknap v. Trimble*, 3 Paige, 601; *Gardner v. Gardner*, 22 Wendell, 526; *Drayton v. Logan*, Harp. Eq. 67. In New Jersey no appeal lies from an order of the Court granting or refusing an issue. *Black v. Lamb*. 1 Beasley (N. J.), 108. So in Pennsylvania. *Scheetz's Appx.* 35 Penn. (State) 88. In Massachusetts, the ordering of an issue to a jury, upon the application of the plaintiff, is within the discretion of the presiding Judge, and not open to exception. *Ward v. Hill*, 4 Gray, 593; *Crittenden v. Field*, 8 Gray, 626. See note above. In *Ray v. Doughty*, 4 Blackf. 116, it was held, that a Court of Chancery may take the opinion of a jury as to any of the facts in controversy between the parties, whenever it thinks proper to do so. See *Lapreese v. Falls*, 7 Ind. 692. In *McGowan v. Jones*, R. M. Charl't. 184, it was held, that although the practice in Georgia is to associate a special jury with the Judge of the Superior Court, in the determination of Chancery causes, there is no law which imposes the necessity of such association. See *Bolton v. Flournoy*, *Ib.* 125.

² See *Hampson v. Hampson*, 3 V. & B. 43.

and so, where the House of Lords thought that the Court below had directed issues improperly, it reversed the order directing the issues, and remitted the cause with directions to the Judge to decide upon the matter himself.¹

And so where it is obvious that the finding of a jury can be in no other way but one, an issue will be refused ; thus, where, in a suit for tithes, a legal exemption was set up, which was supported by proof of non-payment to the rector for a very long period of time, but no satisfactory evidence was given of the legal origin of the claim for exemption, and the Court was satisfied that it was impossible to throw any further light upon the subject than was afforded by the evidence already before it, an issue was refused ; because the Court was of opinion that, were the evidence presented to a jury, they would not be justified in finding that such an exemption ever existed.² So in tithe cases, where the Court was of opinion that a *modus*, as set up by the answer, even if proved, would be bad in Law, it would decree an account against the defendants, without directing an issue to try the validity of the *modus*.³ Upon the same principle, although there was evidence of a continued adulterous intercourse between a married woman and her paramour, the Court refused to grant an issue to try the legitimacy of her child, because there was also evidence of such access between the husband and his wife as was consistent with the presumption of the child's legitimacy.⁴

In *The Bishop of Winchester v. Fournier*,⁵ a case is mentioned of *Bridge v. Eddows*, where the bill sought to have a forged bond delivered up ; but Lord Hardwicke directed an issue, though it is stated to have been proved plainly, that, at the time of the alleged execution of the bond, the pretended obligor was not at the place where he was supposed to have executed it, and his Lordship

¹ *Nichol v. Vaughan*, 2 Dow. & Clark, 420 ; 5 Bligh, N. S. 505, S. C. ; see also *Earl of Winchelsea v. Garety*, 1 M. & K. 253 S. C. The order directing an issue may be set aside at a term of the Court subsequent to that in which it was made, such order being merely interlocutory. *Dabbs v. Dabbs*, 27 Alabama, 646. So the Court may proceed to a final decree without setting aside the order for trying the issue. *Field v. Holland*, 6 Cranch, 8. So where an issue framed and tried does not embrace the objects contemplated, the Court will direct a new and proper issue. *Braxton v. Willing*, 4 Call. 288.

² *Ross v. Aglionby*, 4 Russ. 489 ; *Hildreth v. Schillenger*, 2 Stockt. (N. J.) 196.

³ *Goodenough v. Powell*, 2 Russ. 219.

⁴ *Bury v. Phillpot*, 2 M. & K. 349.

⁵ 2 Ves. 446.

is represented to have said, "that he could not try the question ; — that it was a fact of forgery which he could not enter into and which must be tried." In *Peake v. Highfield*,¹ however, Lord Gifford, M. R., said, "he did not apprehend that Lord Hardwicke meant to go to the full extent of the words there imputed to him, and that in some of the cases which he had referred to, the Court did try the fact of forgery, and, at the hearing, ordered the forged instrument to be delivered up."²

In *Peake v. Highfield*, however, although Lord Gifford was of opinion that the Court had jurisdiction, without directing any trial at Law, to declare an instrument forged, and to order it to be delivered up, yet as both the defendant and a witness had sworn to the execution of the instrument, he considered it would be too much for him to make, at once, a decree in favor of the plaintiff, and, therefore, he directed an issue to try whether the deed in question was the deed of the party by whom it purported to be executed.

It is to be observed, that it is generally in those cases only where there is contradictory evidence, that the Court will be induced to grant an issue to try a controverted fact ; a mere suggestion upon the record, unsupported by evidence, in opposition to evidence on the other side, will not be sufficient.³

It must not, however, be understood, that, unless there is contradictory evidence, the Court has, in all cases, been precluded from sending a matter to be investigated before a jury : it may happen that, although the evidence is all on one side, it is still not sufficient to satisfy the conscience of the Court that the fact is as it is represented to be, and in such cases the Court was in the habit of directing an issue to try the fact, although the evidence in support of it is not opposed by any adverse claim on the other side ; thus, in *Moons v. De Bernales*,⁴ where the defendants had not disputed the plaintiff's title, but had put him to the proof of

¹ 1 Russ. 559.

² See *The Bishop of Winchester v. Fournier*, *ubi supra* ; and *Masters v. Braban*, 1 Russ. 560, n. ; *Secombe v. Fitzgerald*, *ib.* 561, n. ; *White v. Hussy*, Prec. in Ch. 14. An issue was directed to try a question of forging a deed, on a bill issued for the purpose of settling the title to a large tract of land, and to prevent a multiplicity of suits. *Apthorp v. Comstock*, 2 Paige, 482.

³ *Nichol v. Vaughan*, 2 Dow. & Clark, 420 ; 5 Bligh, N. S. 505, S. C. ; see also *Earl of Winchelsea v. Garetty*, 1 M. & K. 253, S. C.

⁴ 1 Russ. 301.

it by their answer, upon which the plaintiffs had gone into long evidence in support of their title, which was not deemed quite satisfactory, issues were directed to try it.¹

It will be recollected,² that the Court may now direct an oral examination of witnesses for its own satisfaction, and it may reasonably be inferred that this practice will be resorted to in many cases where formerly an issue would have been directed.³

It is to be remarked, that, although it has sometimes happened, where, upon the hearing of a cause, a matter not in issue has arisen, which has appeared to the Court material to the question, the Court has directed an issue to try it,⁴ the Court will not permit a party to take an issue, upon a point in question, in a different form from that which he has stated in his pleadings; thus the Court refused to permit defendants to have an issue to prove matters which were not stated in their answers, but which appeared by the answer of the plaintiffs to their cross bill.⁵ So where the plaintiff, in a bill for a specific performance, fails in proving the terms of the agreement he relies upon, the Court will not assist him by directing an issue to ascertain the terms;⁶ and, *è converso*, a party is not entitled to an issue or an inquiry to establish a case relied upon by his pleading, but omitted in proof.⁷

It is to be noticed, that an issue may be granted either upon the original hearing of the cause, or upon a hearing for further directions.⁸ An issue, moreover, has been directed by interlocutory

¹ See also *Burkett v. Randall*, 3 Mer. 466.

² *Ante*, p. 855.

³ *Wilkinson v. Stringer*, 9 Hare, xxiii.

⁴ *Balch v. Tucker*, 2 Cha. Ca. 40.

⁵ *Minor Canons of St. Paul v. Kettle*, 2 V. & B. 1; and see *Bennett v. Neale*, Wightw. 324.

⁶ *Savage v. Carroll*, 2 B. & B. 451.

⁷ *Savage v. Carroll*, 1 B. & B. 548; *Price v. Berrington*, 3 Mae. & Gor. 486.

⁸ See *New Orleans G. L. & B. Co. v. Dudley*, 8 Paige, 452; *Eames v. Eames*, 16 Pick. 141, cited *ante*, 1085, note; *Waterman v. Dutton*, 5 Wis. 413. At what stage of the proceedings application for a trial by jury must be made, to entitle the party to an issue, as a matter of right, was left undecided in *Marston v. Braekett*, N. Hamp. 349. A motion for an issue is premature, if made before the pleadings are closed. The Court should see what facts are controverted, and the plaintiff should have the benefit of the discovery the defendant may make in his answer. *Tibbetts v. Perkins*, 20 N. Hamp. 275. See *Johnson v. Hainesworth*, 6 Ala. 443

orders,¹ as an issue *devisavit vel non* or in an interpleader suit to try the title of the land in dispute between the defendants.² The Court has also directed an issue upon a motion for an injunction,³ or for a receiver,⁴ where the facts upon which the plaintiff relies, as the foundation of his application, are positively denied upon the affidavit of the defendant.

Frequently, however, the Court has refused to grant an issue upon motion before hearing, unless upon consent.⁵

It is not usual for the Court to direct an advance out of a fund in Court to enable the parties to try an issue directed by the Court, but such a permission has in one case been given.⁶

An issue may be directed, not only upon questions between parties to the suit, but also upon claims brought in under a decree, by persons not upon the record.⁷

¹ In Massachusetts, the order directing an issue for the trial of a question of fact by a jury, is regarded as interlocutory. *Eames v. Eames*, 16 Pick. 141; *Ward v. Hill*, 4 Gray, 595. So in Alabama. *Dabbs v. Dabbs*, 27 Alabama, 646.

² *Middleton v. Sherburne*, 4 G. & C. 358; *Kent v. Burgess*, 11 Sim. 361; *Townley v. Deane*, 3 Beav. 213; *Lancashire v. Lancashire*, 9 Beav. 259.

³ *De Tastet v. Bordenave*, Jac. 516.

⁴ *Gardiner v. Rowe*, 4 Mad. 236.

⁵ *Fullager v. Clark*, 18 Ves. 481. See *Eames v. Eames*, 16 Pick. 141, cited ante, 1085, note; *Waterman v. Dutton*, 5 Wis. 413. In Tennessee, issues of fact may be framed by agreement of parties, or by the Court on the application of either party, before the cause is opened, or heard at all. *Lancaster v. Ward*, 1 Overton, 430.

In *Charles River Bridge v. Warren Bridge*, 7 Pick. 369, 370, Parker C. J., said: — "But it is objected that according to the course of proceedings this motion is premature, because an issue can be directed only on a hearing, for it cannot be determined of what facts the issues shall consist, until after a hearing shall have taken place, and the evidence is looked at, which is adduced in support of the facts. If it were true that issues to the country should be ordered only when the Court, on inspecting the evidence, found a difficulty in deciding the fact, this position would be maintained; but certainly a full hearing is not necessary in order to come to the result, for if by inspecting the bill and answer it should be perceived that there are important facts asserted and denied, we do not see why issues may not be directed as soon as the Court shall determine, in their discretion, that those facts shall be so ascertained; and certainly much time may be saved by this course of proceeding." "If, however, it is still insisted, that a hearing to some extent should be first had, in order to understand the pertinency of the facts sought to be tried, we will hear counsel further upon that point."

⁶ *Coombs v. Brooks*, 3 De G. & S. 452; but see *Trye v. Maule*, 4 M. & C. 342; *Johnson v. Tood*, 3 Beav. 228.

⁷ *Price v. Price*, cited 2 Smith's Ch. Pr. 76.

In the case of *Bacon v. Jones*,¹ Lord Cottenham observed upon the duty of the plaintiff to put his case in course of legal trial without unnecessary delay. It must be observed, that since that time a Court of Equity has, however, to deal with such questions itself, without sending them to Law.

The Court sometimes directs one issue only, and sometimes several, according to the number of substantial points upon which it is necessary to take the opinion of a jury: and it will, where the point to be decided embraces several circumstances, direct an issue upon each of those circumstances.²

Issues concerning lands, or other corporeal or incorporeal hereditaments, ought strictly to be tried in the counties where the same are situate; but the Court will sometimes direct the venue to be laid in another county.³

In directing an issue, the Court usually directs the party supporting the affirmative to be the plaintiff in the issue;⁴ this is usually the plaintiff, but the Court will direct the defendant in Equity to be plaintiff in Law, if the issue can thus be more conveniently raised.⁵

The plaintiff in the issue has the right of selecting the Court in which it is to be tried.⁶

It is said that the Court seldom or ever directs a trial at bar,⁷ but only intimates that it would be desirable;⁸ this, however, is not strictly correct, for although the Court, owing to the great in-

¹ 4 M. & C. 433.

² *Bryan v. Parker*, 1 Younge & C. 170; *Bailey v. Sewell*, 1 Russ. 239; *Hippesley v. Horner*, Seton, 349; see also *Earl of Newburgh v. Countess of Newburgh*, 5 Mad. 364. The issue may consist of a series of specific questions. *Black v. Lamb*, 1 Beasley (N. J.) 108.

³ *Chapman v. Smith*, 2 Ves. 516; and see *McGregor v. Topham*, 8 Hare, 489. In Massachusetts, the trial of issues is to be had in the county where the cause is pending. Genl. Sts. c. 113, § 22.

⁴ See *Singleton's Will*, 8 Dana, 316.

⁵ *Parker v. Morrell*, 2 Ph. 453; *Mott v. Blackwall Railway*, 2 Ph. 632.

⁶ *Antrobus v. East India Company*, 5 Mad. 3. In Massachusetts, the Court may direct the trial to be had at the bar of the Supreme Judicial Court or the Superior Court; neither party has a right of selection. See Genl. Sts. c. 113, § 22.

⁷ *Trials at bar* in this connection are those that take place before all the Judges at the bar of the Court in which the action is brought. Tomlins L. Dict. Tit. Trial; a trial before the full Court in term. Burrill L. Dict. Tit. Trial.

⁸ 2 Mad. P. & P. 626.

crease of expense attendant upon trials at bar, is very cautious in directing an issue so to be tried, yet frequent instances are to be found in which such trials have been directed;¹ and, it seems, that even new trials may be directed of issues which have been tried at bar.² In *Parker v. Hart*,³ Lord Hardwicke directed the trial to be at the bar of the Court of King's Bench, provided the party praying it would consent that, if he prevailed, he would be contented with *nisi prius* costs.⁴

In directing an issue, the Court will order the parties to make such admissions as are necessary to raise the question to be determined.⁵ It will also order the parties to produce, at the trial, all documents in their possession, custody, or power, which the other parties may require, or which the Court may think necessary for a complete investigation;⁶ and, if such order does not form part of the original order directing the issue, it may be obtained afterwards, upon motion.⁷ It seems, however, that such an order can-

¹ See *Baker v. Hart*, 3 Atk. 542; 1 Ves. 28, S. C.; *Hite v. Salter*, 2 Dick. 495; *Richards v. Symes*, 2 Atk. 320; *Attorney-General v. Montgomery*, ib. 378.

² *Regina v. Ball de Bewdley*, 1 P. Wms. 212; *Richards v. Symes*, 2 Atk. 320; *Baker v. Hart*, 3 Atk. 542; 1 Ves. 28, S. C.; *Coker v. Farewell*, 2 P. Wms. 563.

³ *Ubi supra*.

⁴ See also *Hite v. Salter*, 2 Dick. 495.

⁵ *Fenwick v. James*, Seton on Decrees, 513, last edit.; *Elderton v. Lack*, 2 Ph. 680; *Duke of Beaufort v. Morris*, 2 Ph. 683. So the Court, in directing an issue, may order that a party shall not traverse a particular fact, *Hodges v. Pingree*, Essex Co., January, 1860, and may impose any other restrictions upon the parties that will prevent fraud and surprise at the trial. See the directions given in *Apthorp v. Comstock*, 2 Paige, 485; and *Clark v. Congregational Society*, 44 N. Hamp. 382. But the Court will not order the admission of any fact in issue in the cause, not clearly admitted on the pleadings. *D. Beaufort v. Morris*, 2 Phill. 683; *Rogers v. Nowill*, 6 Hare, 337; 2 Seton Dec. (3d Eng. ed.) 980.

⁶ *Carte v. Hodgkin*, 2 Ph. 342; 2 Seton Dec. (3d Eng. ed.) 980, 981.

⁷ *Marsh v. Sibbald*, 2 V. & B. 375. It has been decided in Virginia, that any papers may be read at the trial of an issue, which were read upon the hearing of the cause, or at a former trial. *McCall v. Graham*, 1 Hen. & Munf. 13. But it will not be considered an irregularity to omit to read them, unless the order contains a positive direction to that effect. *Ford v. Gardner*, 1 Hen. & Munf. 72.

If the Chancellor directs certain depositions to be read at the trial, the Judge must admit them. *Black v. Lamb*, 1 Beasley (N. J.) 108.

In Massachusetts, an issue in a suit in Equity is to be submitted to the jury upon the like evidence as a suit at Law, together with such part of the answers, depositions, and other proceedings in the cause, as the Court shall order. Rule,

not be made unless all the parties to the issue are also parties to the record.¹ The rule, as to producing papers, on a trial at Law, directed by the Court of Chancery, is this :— If the Court, on motion or by decree, directs a trial, that trial is directed in such a way, that all productions which the Court conceives to be useful upon that trial, the creature of its own direction, shall be made.²

Upon this principle, the Court will order documents, which are in the possession of another defendant, to be produced at the trial of an issue,³ even though such defendant declines to be a party to the issue.⁴

It is to be observed, that, although in the case of a trial at Law, directed by the Court of Chancery, the Court has power over every party in the cause who is interested in the question to be tried, to compel such production as may be necessary for a complete trial, such production will not be ordered of documents which the party holds in a distinct character, such as mortgagee, &c.⁵ In a case, however, before the Court of Exchequer, the defendants, in a tithe suit, were ordered to produce at the trial of an issue, and before the Master, deeds produced by them at the hearing, though belonging to their landlord, who was not a party, or to admit, at the trial, the facts which the deeds were produced at the hearing to prove.⁶

Where the Court has ordered an issue or an action at Law, with directions for production of papers, &c., a bill of discovery cannot be filed without leave of the Court.⁷ In former times orders were not unfrequent to the effect, that the parties to the cause should be examined.⁸ It is presumed that, under the present law of evidence, such orders will be useless.⁹

33, of the Rules for Practice in Chancery. So in New Jersey, *Black v. Lamb*, 1 Beasley (N. J.) 108. The answer cannot be read unless the Chancellor so order. *Black v. Lamb*, *supra*. See *Sturtevant v. Waterbury*, 1 Edw. Ch. 442.

¹ *Johnston v. Todd*, 3 Beav. 222.

² This order is now comparatively immaterial, as a Common Law Court can compel production of documents.

³ *Marsh v. Sibbald*, 2 V. & B. 375.

⁴ *Pindar v. Smith*, Mad. & Geld. 48.

⁵ *Pindar v. Smith*, *ubi supra*.

⁶ *Pulley v. Hilton*, 10 Pri. 118.

⁷ *Cooke v. Marsh*. 18 Ves. 209 ; see *Few v. Guppy*, 1 M. & C. 487, 507.

⁸ *Parker v. Morrell*, 2 Ph. 454 ; see *Perkins v. Minchin*, 2 Moll. 24.

⁹ *Ante*, p. 883. This remark will apply to issues out of Chancery, to be tried by jury in any State where parties to the cause are made witnesses.

It may be mentioned, that under the Winding-up Act, 11 & 12 Vict. c. 45, s. 91, the Masters are enabled to direct issues or actions in winding-up cases. The form of the issue was till recently as follows : — The pretended plaintiff declared, that he laid a wager of five pounds with the defendant, on the question in dispute ; and averred that the fact was as he contended it was, and that he therefore brought his suit for the five pounds ; the defendant, by his plea, admitted the wager, but averred the contrary to be the fact ; whereupon the issue was joined, which was directed to be tried.¹

Now, however, by the 8 & 9 Vict. c. 109, s. 19, it is enacted, "That when any Court of Law or Equity may desire to have any question of fact decided by a jury, such Court may direct a summons to be sued out by such persons as such Court shall think ought to be plaintiffs, against such persons as it shall think ought to be defendants therein, in the form set forth in the second schedule to the Act, with such alterations or additions as it may think proper, and thereupon all the proceedings shall go on and be brought to a close as in proceedings under a feigned issue."

It was usual for the order to direct, that, if the parties differed, the issue should be settled by the Master ; but there seems no reason now why the order directing the issue should not be settled in the same manner as any other decree.²

¹ 1 Newl. Pr. 350.

² Ante, p. 1001. Terms are sometimes imposed upon a party to compel him to proceed to trial. *Reeve v. Hodson*, 16 Hare, App. xxiv. Issues should be specific and distinct. *Hall v. Doran*, 6 Clarke, (Iowa,) 433. See *Black v. Lamb*, 1 Beasley, (N. J.) 114, 115. Objections to their form should be made before trial ; *Bassett v. Johnson*, 1 Green, Ch. 155 ; *Black v. Beasley* (N. J.) 108, 115 ; the issues may consist of a series of specific questions. *Ib.*

Where the pleadings present the question of one particular fraud only, an issue on the general question whether there was any fraud, is not warranted. *Brink v. Morton*, 2 Clarke (Iowa,) 411. An issue as raised by the pleadings in Equity, if it be single and sufficiently explicit, may go to the jury. *Savings Bank v. Benton*, 2 Met. (Ky.) 240 ; *Black v. Lamb*, 1 Beasley (N. J.) 114, 115.

In Massachusetts, the statute directs that the Court may frame issues of fact in Equity suits. Genl. Sts. c. 113, § 22. By the Rule of Court it is provided that whenever it is proper to have any fact tried and determined by a jury, the Court will direct an issue for that purpose, to be framed by the parties. Rule, 33, of the Rules for Practice in Chancery.

An issue may be amended in a proper case when an application therefor is seasonably made. *Waterman v. Dutton*, 5 Wis. 413. See Appendix, 5 Rhode Is. 596. Special issues may be framed to have a special verdict ; *Brewster v. Bours*, 8 Cal. 501.

If either of the parties require a special jury, a motion for one should be made to the Court of Chancery.¹ Where lands are in question, the Court will sometimes order the jury to have a view, and where they are to have a view of a particular manor, the Court will order them, sometimes, to take a view of the whole and ascertain the bounds of it.²

In the case of *Ellis v. Bowman*,³ a question arose whether by the order liberty should be given to pray a *tales*. It was finally arranged that liberty should be given, but that neither party should pray a *tales* unless eight special jurymen should attend.

It appears that an application to postpone the trial should be made to the Judge who directed the issue.⁴

The decree or order directing the issue always specifies the time when it is to be tried; but it seems that the Court has no power to make a compulsory order to force the parties to proceed on the issue; if, however, the plaintiff make default in taking the record down for trial at the time appointed, the Court will order the issue to be taken *pro confesso* against him, unless the party can show reasonable ground why the issue could not be tried at the time ordered by the Court.⁵ The probability of the absence of the plaintiff's counsel, at the time of the trial, has been held a reasonable ground for putting off the trial,⁶ or the inability to attend of material witnesses, and if the Court grants the application, it may impose such conditions as it thinks proper.⁷

It is the duty of the defendant in the issue to name an attorney to appear for him in the Court of Law in which it is to be tried, and, if he neglects to do so, an order may be obtained that he may name an attorney in four days, and that, in default, the issue

¹ *Anon.* 2 P. Wms. 68; and see the cases cited in *Ellis v. Bowman*, 13 Beav. 318; *Parker v. Morrell*, V. C. K. B., cited in *Seton on Decrees* (last edit.), 513. In the case of *Apthorp v. Comstock*, 2 Paige, 485, the order contained a direction that the trial should be by a special jury, if either party should so request. So in *Bassett v. Johnson*, 2 Green Ch. 422.

² *Prac. Reg.* 263.

³ 13 Beav. 318.

⁴ *Kebel v. Philpot*, 9 Sim. 614; *Bearblock v. Tyler*, 1 J. & W. 226; *Hargrave v. Hargrave*, 9 Beav. 153.

⁵ *Bearblock v. Tyler*, 1 J. & W. 225; *Casborne v. Barham*, 5 M. & C. 113; *Johnston v. Todd*, 3 Beav. 218. See *Basset v. Johnson*, 1 Green Ch. 154.

⁶ *Bearblock v. Tyler*, *ubi supra*.

⁷ *Hargrave v. Hargrave*, 8 Beav. 289; *Reeve v. Hodson*, 10 Hare, App. xxiv.

be taken as tried and a verdict given for the plaintiff, or the Judge in Chancery may dispense with it.¹ So, also, if the plaintiff makes default in going to trial, the issue will be taken *pro confesso*.²

After an order to take the issue *pro confesso*, the cause should be set down for further directions, and to have the issue taken *pro confesso* pursuant to the order.³

It may be stated here, that a Judge at Law trying an issue has no authority to decline trying it, or to refer it to another mode of trial, viz., by arbitration; but if the parties think proper to refer it to arbitration, and a reference is adopted by consent, the effect of that is to abandon not merely the direction to try the issue, but the whole proceeding.⁴

The course of proceeding upon the trial of an issue is generally the same as that adopted in ordinary trials at Law, except where the Court of Chancery has given any special directions upon the subject.⁵ It is, however, to be remarked, that, where a devisee seeks to establish a will of real estate against the heir,

¹ *Wilson v. Ginger*, 5 M. & C. 520; *Hartland v. Dancocks*, 5 De G. & Sm. 561; *Constable v. Angel*, cited *ibid*.

² *Gasborne v. Barham*, 5 M. & C. 113; *Hargrave v. Hargrave*, 8 Beav. 289.

³ *Anon.* 20th Dec., 1813, cited 1 Newl. 352.

⁴ *Woodley v. Johnson*, 1 Moll. 394.

⁵ Where a feigned issue for the trial of a fact is directed by the United States Circuit Court for the third circuit, in an Equity suit, the case is put on the trial list, and the jury sworn to try the issue, in the words of the order of issue itself. *Wilson v. Barnum*, Wallace jr. 342.

In Massachusetts, cases at Law and in Equity are entered indiscriminately upon the docket of the Supreme Judicial Court in each county; and issues in an Equity suit sent to the bar of the Court for trial, take the order of the case upon the docket, unless some special direction is given by the Court. But *appeals* in Equity are by statute required to be entered on a separate docket. Genl. Sts. c. 113, s. 14.

"After the issue is settled or agreed upon, the subsequent proceedings are regulated by the practice of the Court in which it is to be tried; subject, however, to the control of the Court of Chancery over the parties, as to the mode and terms of trying such issue. 1 Hoff. Ch. Pr. 511; 1 Turn. Prac. 450. The Court of Law knows nothing of the equitable proceedings in the case, or whether there is any, or what are the pleadings in the Court of Equity. The Court must try the issue, not as an equitable proceeding, nor regulated by any statutes or rules which are applicable to proceedings of an equitable nature. The issue must be tried as a strict issue at law." *Black v. Lamb*, 1 Beasley (N. J.) 123.

As to the testimony, it is the right and the usual course in the trial of an issue

the rule of the Court requires that the due execution of the will should be proved by the examination of all the attesting witnesses to it, who are in existence or capable of being examined; and that the same course is also necessarily required upon the trial of an issue *devisavit vel non*,¹ except when the circumstances are such, that, by the common rules of evidence, proof of the witness's handwriting may be substituted for the testimony of the witness himself, as where the witness is dead or abroad, or is insane,² or where, after diligent search, he cannot be found.³

out of Chancery, to examine the witnesses *vicâ voce*. *Paul v. Paul*, 2 Hen. & Munf. 525.

In Massachusetts, such issue shall be tried upon the like evidence as in a suit at law, together with such part of the answers, depositions, and other proceedings in the cause, as the Court shall order. Rule, 33, of the Rules for Practice in Chancery. Such is the practice in New Jersey, *Black v. Lamb*, 1 Beasley (N. J.) 108. The answer cannot be read unless the Chancellor so order. *Black v. Lamb*, *supra*.

In New Hampshire, in the case of *Marston v. Brackett*, 9 N. Hamp. 337, the Court held, that if a party, after the evidence in Chancery has been closed, has a trial by jury, the case is to be tried before the jury upon the evidence taken for the hearing in Chancery, unless the Court, upon cause shown, otherwise order. But the Court may make an order permitting further evidence to be introduced, and may order the parties to be examined, if the case appears to require it.

This latter order would of course be useless in any State where parties to a cause are made witnesses by the general law.

In *Clark v. Congregational Society in Keene*, 44 N. Hamp. 382, it was held that where issues are awarded in a suit in Equity, after proofs are taken, the Court may in its discretion direct, that on the trial of those issues, the depositions already taken may be read, unless the attendance of the witnesses is actually procured, — and also that such further evidence may be adduced, including the testimony of the parties, as, by law, would be competent on the trial of such issues. See the decree of the Court in this case.

It is within the discretion of the Judge to allow the jury to take out papers ordered to be read to them. *Black v. Lamb*, 1 Beasley (N. J.) 108.

¹ *Townsend v. Ives*, 1 Wils. 216; *Ogle v. Cook*, 1 Ves. 178; *Bullen v. Michel*, 2 Pri. 399; *Bootle v. Blundell*, 19 Ves. 494; *Cooper Ch. Rep.* 136. See the cases to this point in note to ante, page 871; *Powell v. Cleaver*, 2 Bro. C. C. (Perkins's ed.) 504, note (b); *Lord Carrington v. Payne*, 5 Sumner's Ves. 404, Perkins's note (b), and cases cited; 2 Greenl. Ev. § 694, note; 2 Story Eq. Jur. § 1447; *Bootle v. Blundell*, 19 Sumner's Vesey, 494, note (b), 500.

² *Powell v. Cleaver*, 2 Bro. C. C. 503; *Lord Carrington v. Payne*, 5 Ves. 404; *Bernett v. Taylor*, 9 Ves. 381.

³ *James v. Parnell*, Turn. & Russ. 417. For the reason of this rule, see Lord Eldon's judgment, *Bootle v. Blundell*, 19 Ves. 404.

The rule applies only to the case of a bill filed to establish a will, and an issue directed by the Court upon that bill;—where the bill was filed, by the heir at law, to restrain the devisee from setting up a legal estate as a bar to an ejectment upon the hearing, and an issue *devisavit vel non* was directed, in which the devisee was plaintiff, upon a motion for a new trial, on the ground that all the attesting witnesses had not been examined, it was held, that the case stood upon a ground directly opposed to that upon which the ordinary cases of bills to establish wills rested, inasmuch as, so far from the heir at law being bound by the decree which he sought to obtain, it was he who sought to bind the devisee; and such was the form of his application, that if he failed, upon that issue, he would not be bound himself.¹

It may be mentioned in this place, that where an order for an issue directs all the witnesses to be examined, but the plaintiff declines to call some, conceiving his case to be made out, the Judge himself will call the others.²

It has been before stated, that the ordinary method of proving depositions taken in the Court of Chancery, upon the hearing of a cause in another Court, is by proving the bill and answer,³ which is done for the purpose of laying a foundation for the introduction of such evidence, by showing that there has been matter in issue between the parties, but that such rule has gradually been relaxed, and, in directing an issue to be tried at Law, the Court will order the depositions taken in the cause to be read at the trial of the issue,⁴ so as to dispense with the strict proof, which would otherwise be required, of the bill and answer.⁵ The object of the Court,

¹ *Tatham v. Wright*, 2 R. & M. 1.

² *Groome v. Chambers*, 2 Mont. & Ayr. 742.

³ *Ante*, p. 863.

⁴ If the Chancellor directs certain depositions to be read at the trial, the Judge must admit them. An order made by the Court of Chancery that certain evidence shall be read at the trial, is binding on the Judge who conducts the trial, and he has nothing to do with the admissibility of the whole or any part of the evidence. *Black v. Lamb*, 1 Beasley (N. J.) 108. The Chancellor may give directions to the Court to which the issue is sent for trial to disregard the strict rules of law; he may direct the admission of evidence which the rules of law would exclude; he may direct that one or both of the parties may be examined in the trial in States where the parties are not legal witnesses. 1 Beasley (N. J.) 113; *Ringwalt v. Ahl*, 36 Penn. State R. 336; *Yingling v. Hesson*, 16 Maryland, 112.

⁵ *Ibid.* 695. The answer cannot be read unless the Chancellor so order. *Black*

however, in making such an order, is merely that of dispensing with the strict legal proof of the record,¹ and it is not intended to authorize the reading of the depositions of witnesses in cases in which the Court of Law would not admit them to be read upon proof of the record, in the ordinary way, *i. e.* unless proof be given that the witness is dead, or abroad, or otherwise unable to attend; it, therefore, generally adds to the order a direction, that the depositions of the witnesses shall be read at the trial of the issue, in case such witnesses or either of them shall be dead at the time of the trial, or shall be proved, at such trial, to be in such state of health as not to be capable of attending the trial.²

It is to be remarked, that the effect of such an order is to leave the question, as to the admissibility of the depositions, to the determination of the Judge before whom the issue is tried,³ who will require strict proof before he admits the depositions of the death of the witness, or of his inability to attend.

It seems that there is no absolute rule requiring that the inability of a witness to attend shall be left to the decision of the Judge at *nisi prius*, the fact of a witness's capacity being equally within the provision of the Court directing the issue; where, therefore, the Court can be satisfied that the question of the ability or inability of the witness to attend can have but one conclusion, it will itself decide it, without imposing upon the party the necessity of trying that fact before the Judge at *nisi prius*, who would be the person to try it, and not the jury.⁴

Where a witness who has been examined in a cause, and afterwards *vivâ voce* upon the trial of an issue, dies, and a new trial of the issue is directed, not only his depositions in the cause may be read at the new trial, but what he swore at the former trial may be given in evidence.⁵

v. Lamb, 1 Beasley (N. J.) 108, 123, 127; *Gresley Eq. Ev.* 227. See Rule 33 of the Mass. Chancery Practice, ante, 1101, 1102.

¹ *Gordon v. Gordon*, 1 Swanst. 170.

² *Palmer v. Lord Aylesbury*, 15 Ves. 176; *Turner v. Maule*, 2 De G. & Sm. 211; and see *Seton on Decrees* (last edit.), 515.

³ See note (1) above.

⁴ *Corbett v. Corbett*, 1 V. & B. 335.

⁵ *Coker v. Farewell*, 2 P. Wms. 563; *Baker v. King*, 6 Yerger, 402. The rule at law, also, is, that the decease of a witness will let in evidence of what he swore at a former trial. *Glass v. Beach*, 5 Vermont, 172; *Jackson v. Bailey*, 2 John. 17; *Miles v. O'Hara*, 4 Binn. 108, 111; *White v. Kibling*, 11 Johns. 128; *Beals*

The rules with regard to the examination of witnesses *de bene esse*, with a view to using their depositions upon the trial of an issue, have been before referred to.¹ It is to be recollected, that when depositions *de bene esse* have been read at the hearing of a cause, it is a matter of course to order them to be read at the trial of the issue, notwithstanding an irregularity in the examination; and that the Court will not discharge the order on the ground of such irregularity, although the party complaining of it did not know of the irregularity in question till after the hearing, and the time was very short between the publication of the depositions and the hearing of the cause, as the party complaining of the order might have applied for time to enable him to examine whether the depositions had been regularly taken.²

A person who is interested in the result of an issue, but who refuses to be a party to it, may nevertheless be allowed to attend the trial by counsel.³ He will, in such case, be included in the common order for the production of documents.⁴

After the trial has been had, the Judge, before whom it has been tried, certifies how the verdict was found, but it is not usual to enter up judgment on the verdict.⁵ If any special circumstances occur at the trial, which the Judge may think it right to report to the Court, he indorses it on the *postea*, for which purpose it is the habit of the Court, in ordering an issue, to direct that if the substance of the issue is found, but with some special circumstances, which may be material in measuring the extent of relief to be

v. Guernsey, 8 John. 446; *Wilbur v. Selden*, 6 Cowen, 162; *Crary v. Sprague*, 12 Wendell, 41; *Hobson v. Doe*, 2 Blackf. 308; 1 Greenl. Ev. § 163, 164, 165, 166, and notes. Upon the question, whether this kind of evidence is admissible in any other contingency, except the death of the witness, there is some discrepancy among the American authorities. See this subject discussed, and the cases cited in which it has been allowed or disallowed, in 1 Greenl. Ev. § 163, note; *Chess v. Chess*, 17 Serg. & R. 409; *Irwin v. Reed*, 4 Yeates, 512; *Wilber v. Selden*, 6 Cowen, 162; *Le Baron v. Crombie*, 14 Mass. 234; *Drayton v. Wells*, 1 Nott & McCord, 409; *Finn's Case*, 5 Rand. 701; *Crary v. Sprague*, 12 Wend. 41; *Magill v. Kauffman*, 4 Serg. & R. 317; *Carpenter v. Groff*, 5 Serg. & R. 162; *Miller v. Russell*, 7 Martin, 266, N. S.; *Noble v. Martin*, 7 Martin, N. S. 282; 1 Phil. Ev. 231, note 441, by Cowen & Hill; 1 Greenl. Ev. § 167, and notes.

¹ Ante, p. 954.

² *Gordon v. Gordon*, 1 Swanst. 166.

³ *Pindar v. Smith*, Mad. & Geld. 48.

⁴ Ante, p. 1098.

⁵ 1 Newl. 352; Bull N. P. 334; *Gresley Eq. Ev.* 161, note.

given on further directions, that matter should be indorsed on the *postea*.¹

It may be mentioned here, that upon the trial of an issue, a bill of exceptions for an alleged misdirection of the Judge will not lie,² but the regular course is to apply to the Court which directed the issue for a new trial. In *Armstrong v. Armstrong*,³ however, a bill of exceptions was tendered and signed by the Judge, and the objection to its regularity having been waived, it was argued and decided upon in the Exchequer Chamber.⁴

It has been before stated, that after the trial of an issue, a plain-

¹ *White v. Lisle*, 3 Swanst. 342, 345. The *postea* should be returned to the Chancery Court. *Trenton Banking Co. v. Rossell*, 1 Green Ch. 492. The Judge, before whom the issue is tried, should not only return the *postea*, but go further, and furnish to the Court of Chancery a fair statement of the trial. His certificate has always its weight. *Bassett v. Johnson*, 1 Green Ch. 154. It is not necessary, that the report of the Judge should state the evidence and give a minute history of the trial. But he should state the general character of the evidence offered, the part objected to, and the decision made upon the objection, with his charge to the jury. *Ib.* If any difficulty exist in relation to the report of the Judge, the Court will not, for this cause alone, grant a new trial, but will call on the Judge for an additional report of the case. *Ib.* The Court will send for minutes of Judges and counsel. *Gresley Eq. Ev.* 527. The finding of the jury must appear by the record, certified by the Judge. A certificate of the Judge made from memory will not be sufficient. *Baker v. King*, 6 Yerger, 402. As to the form of a verdict, see *State v. Farish*, 23 Miss. (1 Cush.) 483.

² Nor can an appeal be taken. *S. C. Railroad Co. v. Toomer*, 9 Rich. Eq. (S. C.) 270. In *Ex parte Story*, 12 Peters, 343, Taney C. J. said: "A bill of exceptions is altogether unknown in Chancery practice."

³ 3 M. & K. 45; 2 Seton Dec. (3d Eng. ed.) 991.

⁴ The case of *Pingree v. Hodges*, an Equity suit, in which issues were framed by the Court, and tried by a jury in Essex County, Mass. 1861, went before the full bench *on exceptions* taken to the rulings of the Judge who presided at the trial. No objection was made, and the point was not considered before the full bench. The case is not reported.

In *Dodge v. Griswold*, 12 N. Hamp. 573, it was held that where an issue in a suit in Chancery is sent to the Court below for the verdict of a jury, exceptions to the testimony submitted must be taken and certified back to the Court, or such exceptions will be considered as waived. Upham J. said: "In no other mode can we obtain the proper and authentic evidence of what transpired at the trial." See *Fitzhugh v. Fitzhugh*, 11 Grattan (Va.) 210; *Lansing v. Russell*, 13 Barb. 510; *Stannard v. Graves*, 2 Call, 369; *Ford v. Gardner*, 1 Hen. & M. 72.

Where exceptions are taken on the trial of an issue out of Chancery, and made part of the record, the certificate to the verdict by the Court of Law is a certificate to the whole record, and the exceptions, though not expressly certified, become a part of the Chancery record. *Watkins v. Carlton*, 10 Leigh, 560.

tiff cannot move to dismiss his own bill with costs, although he might have done it before the trial actually took place.¹

It seems that the plaintiff in an issue may suffer a nonsuit, and that if he does so advisedly, in consequence of any unforeseen occurrence at the trial, which would have rendered further proceeding with it unsafe, the Court will grant him a new trial, notwithstanding the nonsuit.²

If the party against whom the verdict is found is dissatisfied with it, and wishes for a new trial, he must make an application for it to this Court, in which respect the practice upon issues differs from the practice upon actions at Law, brought under the direction of the Court, a new trial in which must always be moved for in the Court in which the action is brought.³ And when the decree expressly directs the issue to be tried at a particular time, any application to postpone the trial must be made to the Court which directed the trial.⁴

The reason of this distinction is laid down by Lord Eldon to be, that if this Court thinks proper to consider the case upon the record as fit to be governed by the result of a trial, the review or propriety of which belongs to a Court of Law, the opinion of a Court of Law is sought in such a form that it is regarded as conclusive, whether the judgment is obtained upon a verdict or in any other shape ; but upon an issue directed, this Court reserves to itself the review of all that passes at Law ; and one principle upon which the motion for a new trial is made here, and not to the Court of Law, is, that this Court regards the Judge's report, with a view to determine whether the information collected before the jury, together with that which appears upon the record, is sufficient to enable it to proceed satisfactorily, to which it did not conceive itself competent previously.⁵

¹ Ante, pp. 799, 800.

² *Richards v. Symes*, 2 Atk. 319.

³ It appears that sometimes this Court has required an undertaking that the parties should be bound by the result of the first trial. *Ansdell v. Ansdell*, 4 M. & C. 449 ; and see 2 Seton Dec. (3d Eng. ed.) 977.

⁴ *Kebel v. Philpot*, 9 Sim. 614.

⁵ *Bootle v. Blundell*, 19 Ves. 500 ; *Swinfen v. Swinfen*, 27 Beavan, 148, 152, 166 ; 2 Seton Dec. (3d Eng. ed.) 992. See *Doe v. Roe*, 1 Cowen, 216 ; *Doe v. Roe*, 6 Cowen, 55 ; *Apthorp v. Comstock*, 2 Paige, 482 ; *Sinclair v. Price*, 1 Hill Ch. 443 ; *Taylor v. Mayrant*, 4 Desaus. 505, 514 ; *Baker v. King*, 6 Yerger, 402. Where the Court of Chancery directs a suit at law to be brought, the application for a new trial must be made to the Court in which such action is pending. But

The consequence of the principle above laid down is, that there is a material difference between Courts of Law and Courts of Equity in the rules by which they are guided in granting new trials.¹

New trials of issues have been more easily² granted than new trials of actions, as the former were supposed to be directed to satisfy the conscience of the Judge in Equity. It may be doubted whether this practice will continue in modern times, when the principle has been recognized that every Court ought to decide the cases submitted to its jurisdiction.

The Court will, however, grant a new trial upon the production of new evidence, which was not before the jury upon the original trial.³ So if, after a trial, a witness has been convicted of perjury, or a party of forgery, this has been considered as a good ground for a new trial.⁴ The Court, however, will not set aside a trial at Law for any matter which might have been made use of at the trial,⁵ or where it is of opinion that the evidence, though newly discovered, will not afford a foundation for a different verdict.⁶

Where it can be shown that a party has been taken by surprise, and evidence produced at the trial, which he could have no reason to expect would be produced, the Court has directed the issue to be tried again.⁷

Thus where, at the trial of an issue, on a question of legitimacy, where an issue is directed to be tried in a Court of Law, the application for a new trial should be made to the Court which ordered the issue. *Apthorp v. Comstock*, 2 Paige, 482; *Sinclair v. Price*, 1 Hill Ch. 443; *Taylor v. Mayrant*, 4 Desaus. 505, 514; *Alexander v. Alexander*, 5 Ala. 517; *Clayton v. Yarrington*, 33 Barb. (N. Y.) 144; 2 Seton Dec. (3d Eng. ed.) 991.

If the Judge before whom the issue is tried certifies the verdict to be against evidence, the Chancellor will generally direct a new trial. *Southall v. McKeand*, 1 Wash. 336. But this is not a necessary consequence. *Grigsby v. Weaver*, 5 Leigh, 197.

¹ *Stace v. Mabbot*, 2 Ves. 552; *Ex parte Freeman and Stallingers of Sunderland*, 1 Drew. 184.

² *Lord Faulconberg v. Pierce*, 1 Amb. 210; *Cleeve v. Gascoigne*, ib. 323; and see *Locke v. Colman*, 2 M. & C. 42.

³ *Ibid.*; and see *Ansdell v. Ansdell*, 4 M. & C. 449.

⁴ *Tilley v. Wharton*, 2 Vern. 378; see also *Coddington v. Webb*, ib. 240; *Sewell v. Freeston*, 1 Cha. Ca. 65.

⁵ *Curtess v. Smallridge*, 1 Cha. Ca. 22; 2 Freem. 178; *Montgomery v. Attorney-General*, 9 Mod. 388.

⁶ *Colgrave v. Juson*, 3 Atk. 197.

⁷ *Exton v. Turner*, 2 Cha. Ca. 80; see also *Willis v. Farrar*, 3 Y. & J. 264.

a witness was called to prove a fact (showing that there might have been access between a husband and wife at a particular time and place,) which witness had not been examined in a suit in the Ecclesiastical Court, to which the mother of the child whose legitimacy was disputed was a party, and in which his evidence would have been material to her, nor was any attempt made by her in that suit to establish the case of access, which his testimony went to make out, Lord Lyndhurst held that the testimony of this witness was a surprise upon the party against whom it was produced, and its accuracy being impeached by affidavit, he directed a new trial of the issue.¹

The Court will also grant a new trial in cases in which a fraud has been practised upon the party applying.

But although surprise or fraud is in general considered a sufficient ground for directing a new trial, the Court has refused to grant a new trial, upon a mere suggestion that the plaintiff was not apprised of a particular evidence which was made use of at the trial, and therefore was not prepared to answer it.

It may be remarked, in this place, that as it is the rule of the Court that it will not grant a new trial upon the production of new evidence, unless it is shown that there has been some surprise or fraud upon the party applying,² still less will it do so where the party is in possession of the evidence, but either in the exercise of discretion or from neglect does not produce it at the trial;³ or where it can be shown that though he was not in possession of it himself, he had full notice that it was in the power of the other side to produce it; upon this ground, the circumstance of evidence having been made use of at the trial of an issue, which was discovered after the answer of the defendant was put in (the consequence of which was, that the verdict was contrary to the answer and to the true sense and meaning of the issue), was not held a sufficient reason for directing a new trial, there having been no surprise upon the party applying, who, before the trial, had opposed a mo-

¹ *Gibbs v. Hooper*, 2 M. & K. 353; 2 Seton Dec. (3d Eng. ed.) 991; *McGregor v. Bainbrigge*, 7 Hare, 166, n.

² *Standen v. Edwards*, 1 Ves. jr. 133. New trial granted, where the Court was satisfied that the evidence of a witness, discredited at the trial for want of corroboration, may be corroborated. *Shields v. Boucher*, 1 D. & S. 40; 2 Seton Dec. (3d Eng. ed.) 991.

³ *Standen v. Edwards*, 1 Ves. jr. 133.

tion made by the other party, for the express purpose of having the trial postponed, in order that the issue might be rectified.¹

With reference to this subject it may be observed, that where a party, upon the trial of an issue, produces evidence which is a surprise upon the other party, and which would have been sufficient under other circumstances to entitle him to the verdict, he will not be permitted, although the jury find against such evidence, to have a new trial.²

As the Court will not grant a new trial, upon the mere production of new evidence, unless it can be shown that there was a fraud or surprise upon the party applying, so it will not permit a party who has practised a fraud and set up documents which were proved to be forgeries, and by that means prejudiced his own case, to say that, whether the documents were true or false, there is other evidence which makes them immaterial.³

The Court will grant a new trial on the ground that a material witness for the party was absent from the trial, but it will not do so on the mere ground that the testimony of the witness who was absent would only corroborate that of several others to a fact, — it must be shown that there is something particular in his evidence which is of importance, and that it was not in the power of the party to have the trial put off.⁴

A new trial may also be directed on the ground of a misdirection of the jury by the Judge who tried the issue;⁵ so if the Court feels satisfied, from the report of the Judge, that the points in the case have not been distinctly presented to the jury, it will, without entering into the question whether the verdict was or was not satisfactory upon the facts, direct a new trial.⁶

The Court will also order a new trial of an issue where it sees reason to be dissatisfied with the conduct of the jury,⁷ or where

¹ *Legard v. Daly*, 1 Ves. 192; *Yates v. Monroe*, 13 Ill. 212.

² *Carrington v. Jones*, 2 S. & S. 135.

³ *Kemp v. Mackrell*, 2 Ves. 580.

⁴ *Cleeve v. Gascoigne*, 1 Amb. 323. The fact that the plaintiff was dead when the issue was tried, not being known, was held no ground for a new trial. *Bird v. Kerr*, 4 K. & J. 270.

⁵ *Cleeve v. Gascoigne*, 1 Amb. 323; *Bearblock v. Tyler*, Jac. 571. See *Dodge v. Griswold*, 12 N. Hamp. 573.

⁶ *O'Connor v. Cook*, 8 Ves. 536.

⁷ *E. I. Comp. v. Bazett*, Jac. 91; *Pleasants v. Ross*, 1 Wash. 156; *Dodge v. Griswold*, 12 N. Hamp. 576.

there has been an irregularity in the trial. It has been said, that to induce this Court to set aside a former trial of an issue for an irregularity in the trial, and for that cause to grant a new one, there must be ordinarily a certificate in writing from the Judge or Court before whom it was tried, of a verdict against evidence, or other misbehavior of the jury, or such like;¹ this, however, does not appear to be the present practice, and frequent instances occur in the books where the Court has set aside the verdict in such cases, without any such certificate by the Judge, and even in opposition to it, where he has expressed himself satisfied with the verdict.²

A new trial may also be granted because evidence which was tendered was improperly rejected, though it seems that the Court will not direct a new trial upon the latter ground only, if it is satisfied that the verdict is right, upon considering all the evidence, including that which was rejected.³ Where, also, an application is made to the Court to grant a new trial, on the ground of an improper summing up by the Judge, the Court will not accede to it, if it is satisfied that upon the evidence as it stands the jury could not, if the case had been properly summed up, have given a different verdict.⁴

It is to be observed, that if the matter relates to the right to land, the Court will frequently direct new trials of issues, even in cases in which the issue has been properly tried, and the verdict is satisfactory upon the evidence, the practice of the Court being adverse to making a decree to bind the inheritance, where there has been but one trial at Law.⁵ It must not, however, be supposed

¹ *Prac. Reg.* 263.

² See *E. I. Comp. v. Bazett*, *Jac.* 91.

³ *Hampson v. Hampson*, 3 *V. & B.* 41; *Minor Canons of St. Paul's v. Morris*, 9 *Ves.* 155; *Bootle v. Blundell*, 19 *Ves.* 500, 503; *Barker v. Ray*, 2 *Russ.* 63; *Pemberton v. Pemberton*, 11 *Ves.* 50; *Mulloch v. Mulloch*, 1 *Edw. Ch.* 14; *Apthorp v. Comstock*, 2 *Paige*, 482; *Humphreys v. Blevins*, 1 *Tenn.* 178; *Lee v. Beatty*, 8 *Dana*, 207; *Black v. Lamb*, 1 *Beasley (N. J.)* 108, 113, 114; *Basset v. Johnson*, 1 *Green Ch.* 155; *Van Alst v. Hunter*, 5 *John. Ch.* 149. The object of an issue at law is to inform the conscience of the Court; and if the Court can be satisfied, that substantial justice has taken place, the verdict will not be disturbed on mere technical grounds. *Black v. Lamb*, 1 *Beasley (N. J.)*, 114; *Trenton Banking Co. v. Rossell*, 1 *Green Ch.* 511; *Basset v. Johnson*, 1 *Green Ch.* 154. See *Lansing v. Russell*, 15 *Barb.* 510; *Thomasson v. Kennedy*, 3 *Rich. Eq.* 440.

⁴ *Tatham v. Wright*, 2 *R. & M.* 31; see *Ringrose v. Todd*, 12 *Pri.* 650; *Barker v. Ray*, *ubi supra*.

⁵ *Earl Darlington v. Bowes*, 1 *Eden*, 271; *Stace v. Mabbot*, 2 *Ves.* 353; see

that a second trial of an issue can be demanded as a right, for even where the object is to establish a will against an heir at law, who, but for the interference of the Court, would be entitled to take the successive opinions of juries by new ejectments, the Court, if it sees no reason to be dissatisfied with the first verdict, will refuse him a second trial.¹ When a new trial is granted, and it happens that one verdict goes one way and the other another way, then the Court will ordinarily, on motion, order a third trial, which is commonly conclusive.²

But in the case of a will, even after two trials, in both of which the verdict has been in favor of the will, the Court, where it was not satisfied with the manner in which the last trial was conducted, has directed a third trial,³ and that even though it did not appear from the Judge's report that there was any reason to disturb the verdict.⁴

In some cases of great importance, the Court has after one trial directed another trial for the solemn determination of the matter, without setting aside the first verdict, the effect of which is, that the first verdict may be given in evidence upon the second trial, and will have its weight with the jury.⁵

Edwin v. Thomas, 2 Vern. 75 ; in which it was thought to be a sufficient ground for a new trial, that the result concerned all the copyholders of a manor ; see also *Locke v. Colman*, 2 M. & C. 42.

¹ *Wilson v. Beddard*, 12 Sim. 28 ; *Winchelsea v. Wauchope*, 3 Russ. 441 ; *White v. Wilson*, 13 Ves. 88, 42 ; *Waters v. Waters*, 2 D. & S. 591 ; *Hitch v. Wells*, 10 Beavan, 84 ; *Johnston v. Todd*, 5 Beavan, 597 ; *Swinfen v. Swinfen*, 27 Beavan, 148 ; 2 Seton Dec. (3d Eng. ed.) 992. See *Van Alst v. Hunter*, 5 John. Ch. 152. The Court will not feel itself bound by a single verdict either way, if it is not entirely satisfactory ; but will direct new trials, until there is no longer any reasonable ground for doubt. 2 Story Eq. Jur. § 1447, and notes ; *New Orleans Gas Light Co. v. Dudley*, 8 Paige, 452 ; *Binford v. Dommett*, 4 Sumner's Vesey, 756, and note (a) ; *Lansing v. Russell*, 3 Barb. Ch. R. 325 ; *Nell v. Snowden*, 5 Georgia, 1.

² Prac. Reg. 263.

³ Prac. Reg. 263 ; *Pemberton v. Pemberton*, 13 Ves. 290 ; *Attorney-General v. Montgomery*, 2 Atk. 378, cited 1 Ves. 29 ; *Minor Canons of St. Paul's v. Morris*, 9 Ves. 155 ; *Bates v. Graves*, 2 Ves. jr. 287.

⁴ After two concurring verdicts for the same party, on an issue directed by the Chancellor to be tried at common law, he is not bound to direct a new trial, notwithstanding the verdicts were in opposition to the opinions of the Judges, before whom the issues were tried, and a verdict had originally been rendered in favor of the other party. *M'Rea v. Wood*, 1 Hen. & Munf. 548.

⁵ *Baker v. Hart*, 3 Atk. 542. But see *O'Connor v. Malone*, 6 Cl. & Fin. 572 ; 2 Seton Dec. (3 Eng. ed.) 991. An issue directed out of Chancery may be with-

In such cases, it seems that the Court makes it a condition of granting a second trial, that the applicant shall pay to the other party the costs of the first.¹

Where a verdict upon a former trial is given in evidence upon a second trial, it is necessary for the person who gives it in evidence to show upon what title it was obtained ; and, on the other side, they are at liberty to show on what kind of proofs it was given, which, if there is anything which impeaches the evidence on which the first verdict was given, will be very material,² and even where the person who is the guardian of an infant, party to an issue, has been guilty of *malpractices* to obtain the verdict, that fact may be given in evidence to impeach the verdict.³

All applications for new trials of issues directed out of the Court of Chancery should be made by motion or petition before the cause comes on for hearing upon further directions.⁴

In *Legard v. Daly*,⁵ Lord Hardwicke stated as a reason which weighed greatly with him, in refusing an application for a new trial, the length of time (*viz.* five years and a half) which had elapsed since the trial, which he said would be an objection even in Courts of Law ;⁶ and he observed, that, although it had not been set down till lately upon the equity reserved, it could not be said that the other side should not have applied for a new trial, for perhaps the defendant might have no reason to set it down.

Formerly, it was not absolutely necessary to make the application for a new trial to the Judge who directed the issue, and a motion for this purpose might be made before the Lord Chancellor, although the issue had been ordered upon a hearing before the Master of the Rolls ;⁷ but, by the 47th Order of 1828, it has been directed, "That every application for the new trial of any issue at Law, directed by a Judge of this Court, be first made to the Judge who directed such issue." It is to be observed, that the meaning of the above Order has been held to be, that the motion drawn by the Chancellor at any time, and decided by himself. *Cook v. Bay*, 4 Howard (Miss.) 485.

¹ *Baker v. Hart*, 3 Atk. 542 ; see also *Edwin v. Thomas*, 1 Vern. 489.

² *Ibid.*

³ *Ibid.*

⁴ *Attorney-General v. Montgomery*, 2 Atk. 378.

⁵ 1 Ves. 192.

⁶ See *Van Alst v. Hunter*, 5 John. Ch. 152.

⁷ *Pemberton v. Pemberton*, 11 Ves. 50.

should be made before the same *jurisdiction*, though not necessarily before the same individual Judge.¹

The Lord Chancellor has, however, authority to hear applications respecting new trials, by way of appeal from the Courts below, and if either the Master of the Rolls or a Vice-Chancellor refuse to make the order, it may be moved again before the Lord Chancellor ;² or, if any of them make an order for a new trial, the Lord Chancellor may entertain a motion to discharge it.³

Where a party wishes to move for a new trial, the course of proceeding is to make an *ex parte* application to the Court, to send to the Judge who tried the issue for his notes of the trial. This application is not of course, but must be supported by a statement showing a reasonable ground for questioning the verdict.⁴

It is to be noticed, that the form of an issue cannot be changed upon a motion for a new trial. If the party is desirous to question the form of the issue, he must do so by presenting a petition for a rehearing of the decree or order directing it ; and neither party to an issue is precluded by going to trial from afterwards appealing against the order by which it was directed.⁵

After the issue has been tried, and the record completed by the addition of the *postea*, the cause, unless a new trial is moved for and granted, must be set down for hearing. For this purpose a petition must be presented in the usual manner, and with the petition a copy of the decree must be left, and of the record and *postea* thereon, for the Judge. This, however, cannot be done after the trial of an issue or an action, until after the first four days of the term next after the trial have elapsed, in order that the party against whom the verdict has been found may have an opportunity of moving for a new trial.⁶

¹ Footner *v.* Figes, 2 Sim. 319 ; and see Reece *v.* Reece, 1 M. & C. 372 ; ante, 1107, and note.

² White *v.* Lisle, 3 Swanst. 342.

³ In New Jersey, after a verdict, the question of a new trial rests entirely in the discretion of the Chancellor, and his action is not appealable. Black *v.* Lamb, 1 Beasley (N. J.) 108.

⁴ Morris *v.* Davies, 3 Russ. 318 ; see also the memorandum, Mad. & Geld. 58 ; and Hungerford *v.* Joyce, 1 Jones & Latouche, 691.

⁵ White *v.* Lisle, 3 Swanst. 351 ; Legard *v.* Daly, 1 Ves. 192 ; De Tastet *v.* Bordenave, Jac. 516 ; Butlin *v.* Masters, 2 Phil. 291.

⁶ 1 Newl. 357.

The cause then comes on in the regular course, when such final or other decree as the cause calls for will be pronounced.¹

The decree of the Court is usually in accordance with the finding of the jury upon the issue, or, if there have been more trials than one, with the last verdict.²

The Court has, however, never considered itself bound by the verdict, and has even, without directing a new issue, decided against the verdict.³

It may be remarked, that although, as we have seen,⁴ the Court will not make a decree contrary to a positive denial, on oath, by

¹ It can never be known what effect is given to the verdict, or whether any is given to it, until the subsequent hearing upon the merits, and a decree rendered thereon by the Court. Until the verdict has been sanctioned and established by the Court, it is no proof of any fact, but that it was actually rendered in the case, and not proof of the facts found thereby. The verdict, independent of the adoption and sanction of it by the Court, can establish nothing in the case. *Allen v. Blunt*, 3 Story C. C. 746, 747.

² See *Hoffman v. Smith*, 1 Maryland, 475. In Massachusetts, the finding of the jury upon the issue submitted to them, if not set aside for good cause shown, will be regarded as settling the facts in issue conclusively. *Franklin v. Greene*, 2 Allen, 519. So in Virginia, *Paul v. Paul*, 2 Hen. & M. 525; *Fitzhugh v. Fitzhugh*, 11 Grattan (Va.) 210. So in Missouri, *O'Bryan v. O'Bryan*, 13 Miss. 16. So in New York, *Griffith v. Griffith*, 9 Paige, 315. See *Dodge v. Griswold*, 12 N. Hamp. 573; *McDaniel v. Marygold*, 2 Clarke (Iowa) 500; *Halcomb v. Managers New Hope D. B. Co.*, 1 Stockt. (N. J.) 457; *Carter v. Campbell*, Gilmer, 159. If an issue is directed in a Chancery suit at a time or stage in the progress of the suit, when, on the state of the proofs, the bill ought to have been dismissed; even if a verdict is found for the plaintiff, the bill shall, notwithstanding, be dismissed at the hearing. *Smith v. Betty*, 11 Grattan (Va.) 752.

³ *Armstrong v. Armstrong*, 3 M. & K. 45; see *Blackburne v. Gregson*, 1 Bro. C. C. 423, 424. Such is the rule in some other Courts, see *U. States v. Samper-yac*, 1 Hemp. 118; *Scheetz's App.* 35 Penn. (State) 88; *Sibert v. McAvoy*, 15 Ill. 106; *Love v. Braxton*, 5 Call. 537; *Allen v. Blunt*, 3 Story C. C. 746, 747; *Freeman v. Staats*, 1 Stockt. (N. J.) 821. A verdict upon an issue ordered by a Court of Equity, is, in no just sense, final upon the facts it finds, or binding upon the judgment of the Court. The Court may at its pleasure set it aside, and grant a new trial, or, disregarding it, may proceed to hear the cause and decide in contradiction to the verdict; or it may adopt the verdict, *sub modo*, and give it a limited effect only. Story J. in *Allen v. Blunt*, 3 Story C. C. 746. The fact that the Chancellor informed his conscience by a verdict, in a case, where there was no need of a jury, does not vitiate a decree. *Pfeiffer v. Riehn*, 13 Cal. 643. And it is too late to object on error that there was no formal order directing an issue, and that the Court had without such order considered the finding of the jury. *Williams v. Bishop*, 15 Ill. 533.

⁴ Ante, pp. 837, 838.

the defendant's answer, upon the evidence of one witness only, but will, where the evidence of such witness is supported by corroborating circumstances, send the matter to an issue ;¹ it will, nevertheless, make a decree upon the verdict, although it appears, by the *postea*, that only one witness was examined.²

The costs of a feigned issue do not follow the verdict as a matter of course, but the finding of the jury is returned back to this Court, and the costs are in the discretion of the Court.³

These costs cannot be obtained upon motion, but the cause must be set down upon further directions ;⁴ and where a person, not a party to the suit, went before the Master under the decree, claiming to be a party interested, and, upon an issue directed, obtained a verdict, it was said that if the Court decided against a new trial, he must be made a party, for the purpose of bringing him before the Court upon further directions.

But although the costs of a feigned issue, directed by this Court, are said to be discretionary, the general rule of the Court in awarding them is, that they follow the event, and are given to the party

¹ Ante, p. 838. Where the allegations of the bill are positively denied by the answer, and the plaintiff has failed to furnish two witnesses or strong corroborating circumstances in support of the bill, no issue should be ordered. *Smith v. Betty*, 11 Grattan (Va.) 752.

² *De Tastet v. Bordenave*, Jac. 521. In Tennessee, the jury are not bound by the strict rule that an answer responsive to the bill shall be taken as true unless contradicted by two witnesses, or one witness and corroborating circumstances, but they may decide upon all the evidence in the case. *Lancaster v. Ward*, 1 Overton, 430.

In *Black v. Lamb*, 1 Beasley (N. J.) 123, the Chancellor, in New Jersey, said : " The issue must be tried as a strict issue at law ; and the rules of law in regard to evidence, its admissibility, and the weight of it, govern the proceedings, except so far as they have been otherwise regulated by the terms of the issue out of this Court. It is a principle upon which Equity jurisprudence is administered, as inflexible in its application as any statute could make it, that in Equity a defendant is entitled to the benefit of his answer, and that where it is responsive to the bill, it must be overcome by the oaths of two witnesses, or of one confirmed by strong circumstances. But if the issue is made up without any order to read the answer at the trial, the Court will not hear it. An appeal to the Court that in Equity the defendant is entitled to the benefit of his answer, would be vain. The reply of the Court would be, that it was trying a pure question of law, and that it had nothing to do with any statute, or rules of pleading, or evidence, regulating proceedings of an equitable nature."

³ 2 Harr. ed. Newl. 570 ; *Decker v. Caskey*, 2 Green Ch. 446.

⁴ *Standen v. Edwards*, 1 Ves. jr. 135 ; and see *Duncan v. Varty*, 2 Phill. 696.

who prevails at Law.¹ This rule, however, is liable to exceptions; thus, in the case of a bill to establish a will against an heir at law, he has a right to be satisfied how he is disinherited; and if an issue is directed to try the will, he will have his costs, although the will is established, unless there are any peculiar circumstances in the case which will induce the Court to refuse them.² The most usual case for refusing an heir at law his costs of an issue is where he sets up insanity and fails to prove it; in such cases the heir is not considered entitled to his costs of the issue.³ In some cases the Court has gone the length of compelling an heir to pay the costs of an issue, but it must be a very strong case to induce the Court to do so; such as the spoliation or secreting of a will,⁴ or where he vexatiously contests the will, by setting up a case of insanity, knowing that the deviser was perfectly sane.⁵ The Court will, however, on the ground of vexation, decree the costs of an issue against an heir who fails where he himself has filed the bill to set aside the will for insanity, instead of proceeding by ejectment;⁶ and it seems that, even where the heir could not have proceeded by ejectment, by reason of outstanding terms, &c., and the Court, for that reason, dismisses the bill without costs, it still will order him to pay the costs of the issue.⁷

When a new trial of an issue is directed, the Court usually reserves the consideration of the costs of the former trial;⁸ but in *Standen v. Edwards*,⁹ an order was made that the defendants, who were infants, on whose behalf the application for the new trial was made, might pay the costs of the former trial before they proceeded to a new trial; and a similar order was made in *Edwin v. Thomas*.¹⁰ It is to be observed, however, that in the first of the above cases, the order appears to have been made as a matter of

¹ Beames on Costs, 234; *Prac. Reg.* 152; *Corp. Rochester v. Lee*, 2 D. M. G. 427.

² *Berney v. Eyre*, 3 Atk. 387; *Wright v. Wright*, 5 Sim. 449; see also *Webb v. Claverden*, 2 Atk. 424; *Crew v. Jolliff*, *Préc. in Ch.* 93; *Grove v. Young*, 5 De G. & Sm. 40.

³ *White v. Wilson*, 13 Ves. 92; *Smith v. Dearman*, 3 Y. & J. 278.

⁴ *Berney v. Eyre*, 3 Atk. 387; *Middleton v. Middleton*, 5 De G. & Sm. 656.

⁵ *White v. Wilson*, *supra*.

⁶ *Webb v. Claverden*, 2 Atk. 424; *Scaife v. Scaife*, 4 Russ. 309.

⁷ *Tatham v. Wright*, 2 R. & M. 1, 32.

⁸ Beames on Costs, Appx. XV. 369.

⁹ 1 Ves. jr. 135.

¹⁰ 1 Vern. 489.

indulgence (after the refusal of the application in the first instance¹), upon the defendant's own allegation, that they had mismanaged their case upon the first trial, and that, in the second case, the new trial was directed, not because the Court was dissatisfied with the former verdict, but upon the ground that the cause was alleged to be of value, and to concern all the copyholds in the manor; and it is presumed that a similar order would be made in any case in which the Court directs a second trial without setting aside the first.²

With reference to the costs of the motion for a new trial, it may be mentioned, that where the motion is dismissed, the costs are not costs in the cause, and cannot be recovered by the successful party, unless the motion is expressed to be dismissed with costs.³

Where the plaintiff in an issue gives notice of trial, but does not proceed, the costs for not going to trial should be moved for in this Court, and not in the Court of Law.⁴ The proper course in such cases is to apply by motion that the plaintiff may proceed to trial at the next assizes, or, in default, that the issue may be taken *pro confesso*.⁵

SECTION II.

Actions at Law.

It will be recollected that, by the Chancery Amendment Act,⁶ it has been recently enacted, that, "In cases when, according to the present practice of the Court of Chancery, such Court declines to grant equitable relief until the legal right or title of the party or parties seeking such relief shall have been established in a proceeding at Law, the said Court may itself determine such title or right, without requiring the parties to proceed at Law to establish

¹ See 1 Ves. jr. 135, S. C.

² Ante, p. 1112.

³ *White v. Lisle*, 4 Mad. 214, S. C.; see also *Devie v. Lord Brownlow*, 2 Dick. 796.

⁴ *Anon.* 2 P. Wms. 68.

⁵ Ante, p. 1101; *Reeve v. Hodson*, 10 Hare, Appx. XXV.

⁶ 15 & 16 Vict. c. 86, § 62.

the same." As this section is not compulsory upon the Court of Equity, it will be necessary to state shortly what was the practice concerning the direction, by Courts of Equity, of actions at Common Law.

In the first place the Court, in making a decree for the dismissal of the plaintiff's bill, sometimes did so without prejudice to the plaintiff's right to proceed at Law,¹ and it also, where the plaintiff's right to equitable relief depended upon a legal title, retained the bill for a certain period, giving the plaintiff liberty, in the mean time, to bring an action for the purpose of establishing his right at Law, in order to found the equitable relief;² in which cases the bill stood dismissed, unless the action was brought within the time limited, further directions being reserved only in the event of a trial taking place.³ There are many other cases, however, in which the Court ordered an action to be brought at Law, instead of directing an issue.⁴ Thus "heirs at law entitled to estates of which their ancestors were seized, *though only in Equity*, and therefore not having the means of proceeding at Law, might come into Equity merely to recover the possession of those estates, and have the deeds delivered up."⁵

The above is cited as one out of many instances in which the Court will direct an action at Law, instead of an issue; and it may be laid down as a general rule, that wherever the foundation of a claim was a legal demand, the Court directed either an action or an issue in Law, guided in some degree by the consideration whether it would be more satisfactory that a motion for a new trial should be in Equity or at Common Law.⁶

In directing an action at Law the Court always orders it to be brought in such a form that the verdict should be regarded as

¹ Ante, p. 1010.

² Ibid.; but if the plaintiff's title turns out to be a strictly legal one, and no case is made for equitable relief with respect to it, the bill will be dismissed; see *Strickland v. Strickland*, 6 Beav. 77.

³ Ante, p. 1013.

⁴ See *Boote v. Blundell*, 19 Ves. 500.

⁵ Per Lord Eldon, *Pemberton v. Pemberton*, 13 Ves. 298.

⁶ Ante, p. 1112; *Butlin v. Masters*, 2 Phil. 290; *Mudd v. Suckermore*, 4 De G. & Sm. 13. An issue is sent from a Court of Equity to be tried before a Court of Law, to aid the Court of Equity in the ascertainment of facts. An action is ordered to be tried in a Court of Law when the equity is based on a strictly legal right. *Fisher v. Carroll*, 1 Jones (Law) N. C. 27. See *Decker v. Caskey*, Saxton, 427.

conclusive.¹ It also provides for a satisfactory trial, by restraining the parties from setting up any legal obstacles to the fair trial of the case, such as outstanding terms,² or the Statute of Limitations,³ or a bankruptcy.⁴

Where directions are given to bring an action, as the action can only be between the parties who are interested in the legal estate, the Court, for the protection of those who are equitably interested, will make it part of the order that they shall be at liberty to attend the trial by counsel, to make such defence as they may be advised.⁵

It is to be remarked that, in such cases, if an abatement in the suit occurred before the trial of the action, by the death of any of the defendants who are at liberty to attend the trial, the suit should be revived before the trial takes place, but it is otherwise where the abatement occurs by the death of a defendant who has no such liberty.⁶

The action was tried in the usual manner, and after verdict, the cause was set down in the same manner as after the trial of an issue,⁷ and in the mean time no proceedings can be taken at Law in consequence of the verdict, except moving for a new trial, without the sanction of the Court. It is to be observed, however, that the hearing upon further directions is not the time when any mistake committed at the trial below can be rectified; and that where, upon further directions, the plaintiff applied to have the damages given by the verdict at Law increased, on the suggestion that interest was omitted to be given, through a mistaken supposition that it would be given in Equity, the Court refused to interfere with the verdict.⁸

If in the course of an action directed by the Court, the mode is misconceived, the party should apply by petition, to enable the Court to do justice.⁹

The consideration of the costs of an action at Law is generally

¹ *Bootle v. Blundell*, *ubi supra*.

² *Pemberton v. Pemberton*, *ubi supra*; *Stevens v. Praed*, 2 Ves. jr. 519; *Buxton v. Sidebotham*, cited, *ibid.* n.; *Pidding v. Franks*, 1 Mac & Gor. 56.

³ *Ibid.*

⁴ *Ibid.*

⁵ See the decree in *Buxton v. Sidebotham*, 2 Ves. jr. 521, note.

⁶ *Humphreys v. Hollis*, Jac. 73; *Belsham v. Percival*, 8 Hare, 157.

⁷ 2 Smith's Ch. Pr. 100, 3d ed.

⁸ *Stevens v. Praed*, 2 Ves. jr. 591.

⁹ *Holworthy v. Mortlock*, 1 Cox, 141.

reserved by the order directing or permitting the action, together with the other costs of the suit, till the cause came on upon further directions, when the Court made such order respecting them as the justice of the case required. In general, however, the costs of the action followed the verdict, as in the case of issues.¹

Where an action is directed to be brought in a Court of Law, and the plaintiff in the action resides abroad, the motion that he may give security for costs should be made in Equity.²

In addition to actions at Law and feigned issues, the Court of Chancery was, until recently, in the habit of sending cases for the opinion of a Court of Law,³ but this practice is now absolutely abolished. For the Chancery Amendment Act⁴ has enacted, that "It shall not be lawful for the said Court of Chancery in any cause or matter to direct a case to be stated for the opinion of any Court of Common Law, but the said Court of Chancery shall have full power to determine any questions of Law, which in the judgment of the said Court of Chancery shall be necessary to be decided previously to the decision of the equitable question at issue before the parties."

SECTION III.

Proceedings under Decrees for a Partition.

IN the case of partition of an estate, if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at Common Law have led to applications to Courts of Equity for partitions,⁵ which are effected by first ascertaining the rights of the several persons interested, and then issu-

¹ See *Stevens v. Praed*, *supra*.

² *Desprez v. Mitchell*, 5 Mad. 87; *Hilton v. Lord Granville*, 5 Beav. 263.

³ In Massachusetts, if upon making an interlocutory decree or order the Justice is of opinion, that it so affects the merits of the controversy, that the matter ought to be determined by the Court of Law, before further proceedings are had, he may report the question for that purpose, and stay all further proceedings, except such as are necessary to preserve the rights of the parties. Genl. Sts. c. 113, § 12.

⁴ 15 & 16 Vict. c. 86, § 61.

⁵ *Thayer v. Lane*, Harring. Ch. 247; *Dinkle v. Timrod*, 1 Desaus. 109. In Massachusetts, there is no general jurisdiction in Equity to make partition of

ing a commission to make the partition required: and upon the return of the commission, and confirmation of that return by the Court, the partition is finally completed by mutual conveyances of the allotments made, to the several parties.¹

Where the title of the plaintiff and of all the other parties is clear upon the record, the Court will, at the original hearing, order a commission of partition to issue.² If the titles are not

lands, there being a complete and adequate remedy at Common Law; but all persons who are interested as joint tenants, tenants in common, or otherwise, in any mill privilege, water-right, or other incorporeal hereditament, may be compelled to divide the same, either by suit in Equity, in the Supreme Judicial Court, or in the manner provided for the division of land in the Courts of Common Law. In the latter case, the Commissioners appointed to make partition shall set forth in their return the best method of setting off to the several parties their respective shares, or interests, and thereupon the Court may require the parties interested to perform such acts as justice and equity may require, and may make all such orders and decrees in the premises, according to the course of proceedings in equity, as may be necessary to do justice between the parties; and under these provisions, partition may be made of the water of a natural stream not navigable, the banks of which are owned by different riparian proprietors. Genl. Sts. c. 136, § 77, 78. See *Hodges v. Pingree*, 10 Gray, 14. As to the Equity jurisdiction in other States and Courts in cases of partition, see *Mundy v. Mundy*, 4 Sumner's Vesey, 122, note (b); *Graham on Jurisdiction* (ed. 1839) 364, 365; *Hewitt's Case*, 3 Bland, 184; *Fisher v. Hopper*, 2 Head (Tenn.) 253; *Miller v. Chittenden*, 2 Clarke (Iowa) 315; *Althause v. Radde*, 3 Bosw. (N. Y.) 410; *Page v. Webster*, 8 Mich. 263; *Matthews v. Matthews*, 1 Edw. Ch. 568; *Cheeseman v. Thorne*, 1 Edw. Ch. 629; 1 Story Eq. Jur. § 646 *et seq.*; 4 Kent (5th ed.) 364, 365, and notes; *Coleman v. Hutchinson*, 3 Bibb. 209. In Massachusetts, Maine, New Hampshire, Ohio, Illinois, Georgia, and probably in most of the other States, partition may be obtained by petition to the Courts of Law without suit. See 4 Kent (5th ed.) 364, and notes; *Morrill v. Morrill*, 5 N. Hamp. 134. Partition may also be effected in New Hampshire by petition in Equity. *Whitton v. Whitton*, 38 N. Hamp. 127. In New York, the Court of Chancery had a concurrent jurisdiction with the Courts of Law, in suits for partition, and an objection in Chancery, that a perfect remedy may be obtained at Law, cannot be sustained. *Jenkins v. Van Shaack*, 3 Paige, 245. So in New Jersey. *Hartshorne v. Hartshorne*, 1 Green Ch. 349. The advantages of proceeding in Equity for partition rather than at Law, are set forth and illustrated by Mr. Justice Story, in 1 Story Eq. Jur. ch. 14, § 653 *et seq.*

¹ Lord Red. 120. Where the object is the partition of an advowson, it is done by the decree (without a commission) directing alternate presentations; *Bodicoate v. Steers*, 1 Dick. 69; and see *Hanbury v. Hussey*, 14 Beav. 152. The Inclosure Commissioners are now empowered to make partition of lands, and in some cases to settle boundaries. See 9 & 10 Vict. c. 70; 14 & 15 Vict. c. 99, § 16.

² *Phelps v. Green*, 3 John. Ch. 302.

clear, the Court will direct an inquiry for this purpose,¹ however, the plaintiff must state upon the record his own title and the titles of the defendants; and, with the view of enabling the plaintiff to obtain a partition, the Court will direct inquiries to ascertain who are, together with him, entitled to the whole subject.²

But although the Court directs such inquiries by the decree, it has usually gone on, by the same decree, to order a partition to take place. This appears to have been done in *Treherne v. Nash*, *Barker v. Westmoreland*; ³ and in *Agar v. Fairfax*.⁴

The Court, however, sometimes abstains from ordering the commission to issue until the cause comes on for further directions upon the report,⁵ but this should not be done except in special cases, in consequence of the delay it may occasion.

¹ The estate and interest of the parties must be ascertained before a commission is awarded to make partition. *Phelps v. Green*, 3 John. Ch. 302. See *Larkin v. Mann*, 2 Paige, 29; *Hamilton v. Morris*, 7 Paige, 39. Where the title is denied, or suspicious, Courts of Equity will not interfere until the party seeking a partition has had an opportunity to try his title at law. See 4 Kent (5th ed.), 364, 365; *Manners v. Manners*, 1 Green Ch. 384; *Lucas v. King*, 2 Stockt. (N. J.) 277; *Wells v. Beall*, 2 Gill & John. 468; *Straughan v. Wright*, 4 Rand. 493; *Stuart v. Colter*, 4 Rand. 74; *Wilkin v. Wilkin*, 1 John. Ch. 111; *Coxe v. Smith*, 4 John. Ch. 271; *Phelps v. Green*, 3 John. Ch. 302; *Martin v. Smith*, *Harper*, S. C. 106; *Jenkins v. Van Shaack*, 3 Paige, 245; *Hitchcock v. Skinner*, 1 Hoff. Ch. R. 21; *Clapp v. Bromagham*, 9 Cowen, 530; *Jarrett v. White*, 3 Ired. Ch. 131; *Burton v. Rutland*, 3 Humph. 435. If the right of the plaintiff is not admitted by the answer, he is bound to make such proof of title as would entitle him to recover in ejectment. *Larkin v. Mann*, 2 Paige, 27, 28. If an issue of fact is joined, the Court may award a feigned issue for the trial thereof. *Ib.* Equity has not jurisdiction to try the legal title to lands. *Manners v. Manners*, 1 Green Ch. 384; *Obert v. Obert*, 2 Stockt. (N. J.) 98. Where the question arises on an Equitable title, set up by the defendant, Chancery must decide on the title. *Coxe v. Smith*, 4 John. Ch. 271; *Lucas v. King*, 2 Stockt. (N. J.) 277. See *Hitchcock v. Skinner*, 1 Hoff. Ch. R. 21. A single recovery in ejectment, if not further controverted at law, is a sufficient establishment of the title at law upon a bill for partition. *Obert v. Obert*, 1 Beasley (N. J.) 423.

² See *Larkin v. Mann*, 2 Paige, 27. The Master's report should, as far as practicable, give an abstract of the conveyances of the several undivided shares or interests of the parties in the premises from the time the several shares were united in one common source. *Hamilton v. Morris*, 7 Page, 39. And the Master should require the plaintiff to trace his title to the common source of title of the tenants in common. *Hamilton v. Morris*, *supra*.

³ Seton on Decrees, 188, 189.

⁴ 17 Ves. 533.

⁵ See *Calmady v. Calmady*, 2 Ves. jr. 568; and *Attorney-General v. Hamilton*, 1 Mad. 214; *Cole v. Sewell*, 15 Sim. 284.

The decree sometimes directs *one or more* commissions of partition to issue,¹ and sometimes it refers it to the Master to settle how many commissions should issue in case the parties differ;² but if the decree only directs one commission, and it afterwards appears to be necessary that there should be more than one, an order for that purpose may be obtained upon motion;³ and this may be had at the instance of the defendant, as well as of the plaintiff in the cause, in which case a direction will be given that, in case the plaintiff shall refuse to sue out such commissions, the defendant may be at liberty to do so.⁴

As the decree directing the commission does not name the Commissioners, the first step, in proceeding under such a decree, is to name them.

Each party appearing by a separate solicitor is entitled to name four Commissioners, and the parties must join and strike their names in the same manner as upon commissions to take answers abroad,⁵ except that where there are more defendants or sets of defendants than one, each defendant or set of defendants joins and strikes names with every other defendant or set of defendants.⁶

To save expense, however, it is very common for the parties to agree, amongst themselves, upon two persons to act as Commissioners.⁷

The Commissioners' names having been struck, or agreed upon, are then inserted in the commission, which it seems ought to be made out by the solicitor for the plaintiff; but if the plaintiff refuses to sue it out, an order may be obtained that the defendant or defendants may be at liberty to do so.⁸

The form of a commission of partition is as follows:—

Victoria, by the grace of God, &c. To A. B., &c., greeting: Whereas, by a decree pronounced in our High Court of Chancery, bearing date, &c., and made upon the hearing of a certain cause, depending in our said Court, Wherein John Doe, &c., are com-

¹ See *Earl of Cardigan v. Sir Edward Montague*, Seton on Decrees, 185.

² *Ibid.*

³ See Hand, 123.

⁴ *Ibid.*

⁵ Ante, p. 757.

⁶ 1 Smith's Ch. Pr. 3d ed. 620.

⁷ *Ibid.*

⁸ Hand, pp. 123, 124.

plainants and Richard Styles is defendant, it was ordered and decreed that a commission should issue, &c. : Now know ye, that we, in confidence of your prudence and fidelity, have appointed you, and do by these presents give full power and authority unto you, any three or two of you, and hereby command you that you, any three or two of you, do meet together, at certain proper and convenient times and places, by you, any three or two of you, to be for that purpose appointed, and that you, any three or two of you, do from thence go to, enter upon, and walk over and survey the estate in question, in the said decree and pleadings of this cause mentioned, and, according to the best of your skill, knowledge and judgment, make a fair partition, division and allotment thereof, and the same separate, divide and allot, and appoint one moiety thereof as and for the share of the said complainants, and the other moiety thereof as and for the share of the said defendants, to be held and enjoyed by the said complainants and defendants in severalty, and the parts so divided, to distinguish and separate by metes and bounds; and for the better making such division, we do hereby authorize and empower you, any three or two of you, to cause all such witnesses as you shall see occasion for, to come before you, and then and there examine each and every of them apart, upon their respective corporal oaths first taken before you, any three or two of you, upon such interrogatories in writing as you shall see occasion for, to discover and make out the truth of the premises, and to take the depositions of such witnesses in writing, and cause the same to be plainly and fairly engrossed or written on parchment. And when ye have done and performed all these things, ye shall certify and return into our Court of Chancery, without delay, wheresoever our said Court shall then be, the facts and proceedings in the premises, by your certificate, fairly written on parchment, together with the said examinations and interrogatories, and also this writ closed up under the seals of you, any three or two of you.

Witness ourself, &c.¹

It is to be observed, that, although the return to the commission is directed to be "*without delay*," the Commissioners are not limited to execute it before the end of the term following that in which it is sealed.²

¹ See *Curzon v. Lyster*, Seton on Decrees, 188; where it is stated, (p. 191,) that the draft of this commission was settled by Lord Redesdale; see also the commission of partition in the *Earl of Cardigan v. Sir Edward Montague*, 2 Newl. Pr. 328.

² 1 Smith (3d ed.) 621.

The commission has always been open and not closed, and the proceedings under it are open and not secret, nor is any oath of secrecy required to be taken by the Commissioners or those employed under them.¹

In order to enable the Commissioners to perform their duty, they are, as we have seen, armed with a power to cause all such witnesses as they may see occasion for, to come before them to be examined. This may be done by summons from the Commissioners, of the same nature as the summons before pointed out as issued by Commissioners for the examination of witnesses,² and, upon the witness attending, the oath may be administered to him by two or more of the acting Commissioners; the oath being the same in form as that administered by the examiner *mutatis mutandis*.³

The witnesses have heretofore been examined upon interrogatories.⁴ The interrogatories are to extend only to such points as the Commissioners see occasion to examine to, and they may reject interrogatories signed by counsel, and suggest others more proper. The discretion, therefore, vested in the Commissioners is, in this case, to be considered as substituted in lieu of the discretion in other cases attributed to counsel under the control of the Court.⁵

Cross-interrogatories, for the examination of witnesses, may be prepared on the spot, and offered to the Commissioners as occasion may require.⁶

Although the interrogatories for the examination and cross-examination of witnesses before Commissioners of partition are usually prepared by the parties, yet the Commissioners may, if they think fit, exhibit interrogatories for that purpose themselves.

Probably hereafter the examination will be directed in a similar form to an examination of witnesses before an examiner.⁷

The Commissioners have power, under the commission, to ex-

¹ See Lord Redesdale's opinion, upon the commission in *Curzon v. Lyster*, Seton on Decrees, 191.

² Ante, p. 758. *Query*, whether a subpoena will lie to compel the attendance of witnesses before commission of partition?

³ Ante, p. 758.

⁴ Beames's Ord. 272, 311.

⁵ See Lord Redesdale's opinion, in *Curzon v. Lyster*, *ubi supra*.

⁶ Ibid.

⁷ Ante, p. 885.

amine the witnesses apart from each other ; and Lord Redesdale's opinion is, that they may do so, if they have any suspicion of manufactured evidence, but that, otherwise, their proceedings should be open, as they act in a judicial capacity, in the nature of a Court at which the parties and their agents have a particular right to be present, as expressly directed by the writ of partition at Common Law.¹

The Commissioners themselves should administer the questions to the witnesses.²

The Commissioners are not bound, personally, to take the depositions, that is, to write down the answers of the witnesses ; but they may employ clerks to do this part of the business. But the clerks must act entirely by their direction, and write the substance of what falls from the witnesses in the language the Commissioners direct. If any dispute arises as to the evidence given by a witness, the Commissioners must agree amongst themselves upon the words of the deposition, and, having done so, the depositions must be read over to the witness, and ought to be signed by the witness before he is dismissed.³

If the Commissioners, on either side, propose to receive evidence touching any matter not relevant to the business before them, the Commissioners on the other side should object to receiving such evidence, and may refuse to sign the depositions, if taken, and to annex them to the return.⁴

The depositions on behalf of the different parties, as well as the examinations taken by the Commissioners to their own satisfaction, should be kept distinct.

When the depositions of the witnesses have been taken and signed, they must be fairly engrossed, upon parchment, under a commission to examine witnesses ; and, according to the directions in the commission, they should be returned together with the interrogatories with the commission.⁵

¹ Ante, p. 885.

² Lord Redesdale's opinion, in *Curzon v. Lyster*, *ubi supra*.

³ *Ibid.* 197.

⁴ *Ibid.* 195.

⁵ In *Watson v. The Duke of Northumberland*, it was stated, at the bar, that upon very few commissions has any return been made of the evidence ; (11 Ves. 157 ;) and Lord Eldon said, he believed the practice to be as it had been stated, and that the return is made without the evidence (*ibid.* 161). It is, however, suggested, that a compliance with the directions of the commission would, in this case as in all others, be the proper course.

According to the usual form of decrees made in cases of partition, all deeds, &c., relating to the estates to be divided, in the custody of any of the parties, are to be produced before the Commissioners, upon oath, as the Commissioners shall direct.¹ When this is the case, the method of compelling the production of the deeds, &c., appears to be, by serving the party with a copy of the decree, and then proceeding by *attachment* and other process of contempt against him.²

Having seen what the powers of the Commissioners under a commission of partition are, we will now proceed to point out the method of executing the commission; and here it is right to observe, that the Commissioners, when once they are appointed, though named by the different parties, are Commissioners for all the parties.³ In fact, they are to act as Judges, the whole power of the Court being delegated to them; and, if all four act, and there is a difference of opinion amongst them, one being of one opinion and three of another, the three make the return; and so, if three are present and two concur in opinion against the third, that is sufficient; but the commission does not authorize two out of four to act, where all four are present; and, therefore, it does not authorize a double return by two Commissioners one way, and by the other two another way; though if two only are present a return by them will be good.⁴

As the Commissioners act as a Court, their proceedings ought to be open. The parties or their solicitors should attend them;

¹ See Seton on Decrees, 184. In *Norris v. Le Neve*, a special order to this effect appears to have been made, directing not only the production of the documents, &c., before the Commissioners, but that they should be deposited in the hands of the respective solicitors of the parties in the country, a fortnight before the execution of the commission, and to be ascertained by the affidavits of the several parties depositing the same, to be made before a Master Extraordinary in the country; and the parties or their agents were to be at liberty to inspect the same in such solicitor's hands, and at their own expense to take copies thereof, or any part thereof, as they should see fitting. Reg. Lib. B. 1741, fo. 473; Seton on Decrees, 201. See post, 875. See *Larkin v. Mann*, 2 Paige, 27, 28.

² See *Trig v. Trig*, 1 Dick. 325.

³ Per Lord Eldon, in *Watson v. The Duke of Northumberland*, 11 Ves. 153, 160.

⁴ *Watson v. The Duke of Northumberland*, *ubi supra*. In New York, all the Commissioners must meet together in the performance of any of their duties; but the acts of a majority so met will be valid. 2 Rev. Stat. § 31, 32. So in Massachusetts. Genl. Sts. c. 136, § 24. So in New Hampshire. *Odiorne v. Seavey*, 4 N. Hamp. 53.

should point out what may tend to give the Commissioners full information on the subject; should produce their deeds and other evidence, as well written as oral; should know what evidence is given on both sides; should be at liberty to cross-examine the witnesses under the control of the Commissioners, and take every step necessary to discover the truth and enable the Commissioners to make a proper return.¹

The commission itself ought to be produced to the Commissioners when they meet, and should remain with them till their proceedings are closed and the return annexed.²

The course to be pursued by the Commissioners under a commission of partition is very clearly pointed out by the terms of the commission. In the first place, they are directed to "*go to, enter upon, and walk over the estate in question, in the said decree and pleadings in this cause mentioned.*" In order that they may do this, they must first ascertain the estates which are the subject of the commission. For that purpose, they must look into the bill and answers; and if, from thence, they can ascertain the property, they must stop there: if they find the descriptions in those instruments such as are not sufficiently accurate to enable them to proceed, they must endeavor to supply the defect in the pleadings by evidence. But the pleadings must still be their guide as to what evidence they shall receive; for they are to divide "*the estates in question in the cause,*" and no others; any evidence, therefore, touching estates not in question in the cause, will be irrelevant to the business before the Commissioners, and ought to be rejected by them, except so far as it may be necessary for the purpose of ascertaining what are the estates in question, and such evidence may be necessary if there is any confusion or intermixture of boundaries³ between the estates in question and those not in question.

Having ascertained what the estate is, which is to be the subject of the partition, the next thing the Commissioners have to do is to make "*a fair partition, division, and allotment thereof,*" into as many shares and proportions as the decree or order, under which the commission issues, directs. In doing this the Commissioners must exercise "*the best of their skill, knowledge and judgment*"; and, provided they do that, and act fairly, the Court will not, as it

¹ See Lord Redesdale's opinion, in *Curzon v. Lyster*, *ubi supra*.

² *Ibid.* 197.

³ Lord Redesdale's opinion, in *Curzon v. Lyster*, *ubi supra*.

seems, distrust their return upon the mere allegation of conflicting opinions by different surveyors, with respect to the comparative value of the several lots ;¹ the Court considering that, as the Commissioners are named by the parties, and are, therefore, judges of their own choice, the principles which apply to arbitrators are properly applicable to them.² Where, however, it can be shown that the Commissioners have committed a gross error in judgment, (although there is no proof of partiality,) the Court will set aside their adjudication.³

It is to be observed, that, in making a partition in Chancery, every part of the estate need not be divided, but that it will be sufficient if each party have his proper share of the whole.⁴

Thus, where two thirds of an estate belonged to the plaintiff and one third to the defendant, and the estate consisted, amongst other things, of a mansion-house and of farms and lands about it, and the defendant insisted that he was entitled to have one third of each allotted to him, Lord Hardwicke said, that "although in making the partition care must be taken that the defendant should have a third part in value of the estate, there was no color of reason that any part of the estate should be lessened in value in order that the defendant should have his third of it, which, if he should have one third of the house and of the park, would very much lessen the value of both."⁵

¹ See In the matter of the Division of the Real Estate of Thompson, 2 Green Ch. 637.

² Jones v. Totty, 1 Sim. 136 ; see also Manners v. Charlesworth, 1 M. & K. 330.

³ Storey v. Johnson, 1 Y. & C. 538, Exch. Rep. See Jewett v. Scott, 19 Texas, 567 ; Geer v. Winds, 4 Desaus. 85. It was held in Riggs v. Dickinson, 2 Scam. 438, that inequality of value, as well as inequality of quantity, is good cause for setting aside a report of Commissioners of partition ; and such inequality may be shown by affidavit. The regularity of proceeding in partition cannot be inquired into collaterally. Wilson v. Bull, 10 Ohio, 250.

⁴ Earl Clarendon v. Hornby, 1 P. Wms. 446. See Larkin v. Mann, 2 Paige, 29 ; Smith v. Barber, 7 Ohio, 118 ; Brookfield v. Williams, 1 Green Ch. 341. In Massachusetts, in proceedings for partition, if there are several petitioners, they may at their election have their shares set off together or in severalty. Genl. Sts. c. 136, § 25. But the Commissioners are to set off only the share or shares of the petitioner or petitioners, which shall be expressed in the warrant. Genl. Sts. c. 136, § 21. See Shull v. Kennon, 12 Ind. 34. The Commissioners may give to the share of one tenant a right of way over land assigned to the other tenants. Cheswell v. Chapman, 38 N. Hamp. 14, 17. See Hoffman v. Savage, 15 Mass. 130 ; Davenport v. Lamson, 21 Pick. 72 ; Chandler v. Goodrich, 23 Maine, 78 ; White v. Story, 2 Hill, 549.

⁵ Earl Clarendon v. Hornby, 1 P. Wms. 446.

So, if there be three houses of different values to be divided amongst three, it will not be right to divide each house, for that would be to spoil every house; but some recompense should be made either by a sum of money, or rent for owelty of partition, to those who have houses of less value.¹

It sometimes, however, has happened, that the estate to be divided consists of one entire thing, such as a house,² or a cold bath;³ in such cases the partition must nevertheless be made, and the difficulty of doing it will be no reason for not effecting it. So the rent payable in respect of water-pipes, by a public company for supplying water, laid through the land, has been divided, by apportioning it between the parties, according to their respective quantities of the land through which the pipes ran.⁴ In like manner a mill or an advowson may be divided by giving to the parties every toll dish or turn of a church, as is done at Common Law in the case of a writ *de partitione facienda*, in which case "*æquitas sequitur legem*."⁵ In such cases, however, it is probable that the Court would direct in what manner the division should be made by the decree, without issuing a commission.⁶

¹ Ibid. To make the value of the several shares equal, one party may be required, under certain circumstances, to pay money on his share to those who receive a share of less value. *Brookfield v. Williams*, 1 Green Ch. 341. See *Graydon v. Graydon*, 1 McMullan, 63; *Williamson v. Swindle*, 1 McMullan, 67.

A decree in proceedings for the partition of the real estate of a person deceased, awarding the property to one of the heirs at the appraisement, is conclusive of the title, as against all parties claiming under the deceased or his heirs, and cannot be collaterally impeached. Such decree diverts the title of the other heirs, and all claiming under them. *Merklein v. Trapnell*, 34 Penn. (State) 42.

² *Turner v. Morgan*, 8 Ves. 145.

³ *Warner v. Baynes*, 2 Amb. 589.

⁴ Ibid.

⁵ *Earl Clarendon v. Hornby*, 1 P. Wms. 446.

⁶ See ante, p. 1122, n. See 1 Story Eq. Jur. § 656. Where a mill, mill-dam, and mill-stream, constitute one entire tenement, held by tenants in common, a petition for partition of the dam and water alone, cannot be sustained. It is questionable whether a mill-dam and mill-stream are property of such a nature as to be capable of partition by metes and bounds. *Miller v. Miller*, 13 Pick. 237. See *Brown v. Turner*, 1 Aik. 350. In Massachusetts, when the premises, of which partition is demanded by the petition, consists of a mill or other tenement, which cannot be divided without damage to the owners, or when any specific part of the estate is of greater value than either party's share, and cannot be divided without damage to the owners, the whole estate, or the part thereof so incapable of division, may be set off to any one of the parties who will accept it, he paying to any one or more of the others, such sums of money as the Commissioners may award, to

The Commissioners having apportioned and divided the property, should proceed to set apart and allot the shares to the parties; this they should do, when it can be accomplished, by lot, for which purpose they should call in some indifferent person, and require that person to draw lots for the shares of each party.¹

It is to be observed, however, that the course of making the choice of shares, by lot, should not be resorted to where it cannot be done with fairness and with due regard to the situation of the parties and of the shares. In such cases it is the duty of the Commissioners to assign the shares to those parties to whom they would be of most value, (independently of their value in the market,) with reference to their respective situations in relation to the value of the property before the partition took place; and where Commissioners were directed to divide land equally between A., B. and C., and they accordingly divided the lands into portions of equal value in the market, but assigned to A. an inn of which C. had been for many years the occupier, on which he had expended money in improvements, and adjoining to which he had purchased property for the purpose of his occupation, it was held by Lord Lyndhurst (L. C. B.) that the adjudication of the Commissioners was wrong, and a fresh commission was directed to new Commissioners.²

make partition just and equal; or the Commissioners may in such case assign the exclusive occupancy and enjoyment of the whole, or any part, as the case may be, to each of the parties, alternately, for certain specified times, in proportion to their respective interests therein. Genl. Sts. c. 136, § 26. See Co. Litt. 164 *b.*; Bishop of Salisbury *v.* Phillips, Carthew, 505; Morrill *v.* Morrill, 5 N. Hamp. 134; Thayer *v.* Thayer, 7 Pick. 209; Lister *v.* Lister, 3 Younge & Coll. 540; Brookfield *v.* Williams, 1 Green Ch. 341; Larkin *v.* Mann, 2 Paige, 27; 1 Smith Ch. Pr. (2d Am. ed.) 480, 481. A partition of a mill-privilege was sustained where it was made, by assigning to each of the owners so much water as would run through a gate of certain dimensions, such division not being shown to be very injurious to the estate. Morrill *v.* Morrill, 5 N. Hamp. 134. See Smith *v.* Smith, 1 Hoff. Ch. R. 506.

¹ Lord Redesdale's opinion, in Curzon *v.* Lyster, Seton on Decrees, 197.

² Storey *v.* Johnson, 1 Y. & C. 538, Exch. Rep.; Canning *v.* Canning, 2 Drew. 434. Where a person takes possession of, and makes improvements upon, land, supposing himself exclusively entitled, but afterwards discovers title in another to a portion of the land, he will, upon partition, be entitled to have the improved portion set off to himself. St. Felix *v.* Rankin, 3 Edw. Ch. 323. See Brookfield *v.* Williams, 1 Green Ch. 341; Borah *v.* Archer, 7 Dana, 176; Louvalle *v.* Menard, 1 Gilman, 39.

Where the part on which improvements have been made by one of the tenants

The Commissioners having divided and allotted the estate, should prepare their certificate, which must detail their proceedings, and appoint the shares of each party, according to their allotments to be enjoyed by them in severalty, distinguishing each part, if so directed by the commission, by metes and bounds.

If the Commissioners cannot agree upon a division or allotment, they must make separate certificates,¹ though the consequence of such separate returns must be, if the Commissioners are equally divided, that they will both be quashed.²

The certificate being prepared, it must be fairly written on parchment,³ and, having been signed by the Commissioners, must be annexed, together with the examinations of witnesses and the interrogatories, to the commission, which must then be closed up, and sealed by the Commissioners, or any two or more of them. It seems that if, by mistake, any document which has been referred to by the Commissioners in their certificate, has been omitted to be annexed to the return, the Court will, upon motion, direct it to be added.⁴ If there are two certificates, they must both be annexed to the commission.

When the commission and return have been sealed up, it is brought, either by a Commissioner or by a messenger, to the Record and Writ Clerk who made it out, or probably, under the present practice, sent by post.⁵ Commissions of this description have, in former times, been objected to, by exceptions to the Master's report. This course is now impracticable, but if any objection can be made to the return of the commission, there is no doubt but what a motion might be made to suppress it. In former times, if any ground existed for objecting to a certificate, which was not properly the subject of exception, such as irregular-

in common, cannot be set off to him with the improvements, he should have an allowance for them. *Borah v. Archer*, *supra*; *Hitchcock v. Skinner*, 1 Hoff. Ch. R. 21; *Sneed v. Atherton*, 6 Dana, 276. And the party receiving the improvements should pay for them. *Respasp v. Breckenridge*, 2 A. K. Marsh. 581. But the improver who has been in possession, should pay rent for the premises. *McClanahan v. Henderson*, 2 A. K. Marsh. 388; *Respasp v. Breckenridge*, *supra*; *Doughaday v. Crowell*, 3 Stockt. (N. J.) 201.

¹ Lord Redesdale's opinion, *ubi supra*.

² *Watson v. The Duke of Northumberland*, 11 Ves. 153.

³ *Jones v. Totty*, 1 S. & S. 219.

⁴ See *Manners v. Charlesworth*, 1 M. & C. 334.

⁵ See ante, p. 761.

ity in its execution, or misconduct or partiality on the part of the Commissioners, it was made the subject of a motion to quash the return.¹

A return might also be partially quashed : thus, in *Norris v. Le Neve*,² Lord Hardwicke directed that such part of the certificate was to be quashed, whereby the Commissioners had certified a doubt concerning a manor and Court Leet, "*because the same was not warranted by the commission.*"

So, if there be a double return, and one party alone applied to quash one of the returns only, the Court will, if it sees proper, order that return to be quashed.³

It is to be observed, that the proper course of proceeding, where two Commissioners make one return and two another, has always been for each party to move to quash the return which is unfavorable to himself.⁴

If, however, one party only complains of the return, the Court will not, in such case, order one return only to be set aside, but will quash both and direct a new commission.⁵

If the return to a commission is quashed, the Court will order a new commission to issue, and, in *Watson v. The Duke of Northumberland*,⁶ where there were two returns, each by two Commissioners, it ordered the new commission to be directed to five Commissioners.

If no exceptions are taken to the certificate of the Commissioners, the order for confirming it should be made absolute ; and then, if the decree contains a direction to that effect, mutual conveyances should be executed by the parties, for the purpose of vesting the allotted portions of the divided estates in each other in severalty.⁷ This is necessary, because, by a partition made in

¹ *Jones v. Totty*, *ubi supra* ; see also *Watson v. The Duke of Northumberland*, *ubi supra*. The report of Commissioners to make partition can be impeached only for fraud, partiality, or gross error of judgment. *Jewett v. Scott*, 19 Texas, 567 ; *Geer v. Winds*, 4 Desaus. 85. To justify setting aside a partition on the ground of mistake, the mistake must be a serious one, and clearly proved. *Matter of Thompson*, 2 Green Ch. 637. See *Cummins v. Nutt*, Wright, 713.

² Reg. Lib. B. 1741, fo. 473 ; *Seton on Decrees*, 201 ; 3 Atk. 83.

³ *Corbet v. Davenant*, 2 Bro. C. C. 251 ; and see *Randle v. Adams*, cited in *Watson v. The Duke of Northumberland*, 11 Ves. 155.

⁴ *Corbet v. Davenant*, *ubi supra*.

⁵ *Ibid.* ; and see *Watson v. The Duke of Northumberland*, 11 Ves. 153.

⁶ *Ubi supra*.

⁷ It is competent for the Court to direct the manner of the partition, and to

Equity, the equitable right only is vested, which is not the case in partitions made at Law, where the legal estate is vested by the partition.¹

Where mutual conveyances are to be executed, it usually forms part of the decree, directing them that they shall be settled by the Judge in chambers, in case the parties differ.

With respect to the title-deeds, &c., relating to the estates divided which are in the possession of the parties, it generally forms part of the decree directing the partition, that they shall be brought into the Record and Writ Clerk's Office by the parties upon oath. The decree contains a direction as to the deposit of the deeds concerning the lands to be divided, usually to the effect that, after the partition, such of them as shall relate to such parts of the premises as shall be allotted to any of the parties alone, shall be delivered to such parties; and as to those which concern any parts of the premises which shall be allotted to any or either of the parties jointly with others, it has sometimes been directed that they shall remain in the Record and Writ Clerk's Office;² but, more generally, the order is that, as to such deeds, the parties are to be at liberty to apply to the Court for directions concerning the same, as they shall be advised;³ in which case, it seems the Court will hold that the party entitled to the estate of the greatest value is entitled to the possession of the deeds, upon undertaking to abide by any order which the Court may make as to the same, with liberty for other parties to apply.⁴

With respect to the costs of a partition, the general rule of the Court is now understood to be that which was pronounced by the Court in giving judgment in the case of *Agar v. Fairfax*;⁵ that, decree the making of conveyances without the necessity of a report and decree of confirmation. *Grassmeyer v. Beeson*, 18 Texas, 753.

¹ *Whaley v. Dawson*, 2 Sch. & Lef. 372; *Miller v. Warmington*, 1 J. & W. 493. Under the statutes of New York, a decree declaring that the "partition shall remain firm and effectual forever," was held sufficient to vest the title to the allotted parcels in the persons to whom they are severally assigned, without the execution of any releases or conveyances. *Younge v. Cooper*, 3 John. Ch. 295.

² *Trodd v. Downes*, Seton on Decrees, 188.

³ See decree in *Earl Cardigan v. Sir Edward Montague*, Seton on Decrees, 184.

⁴ See the form of order in *Jones v. Robinson*, 3 De Gex, Mac & G. 910; with the general form of an order as to title-deeds settled by Lord Hardwicke, Hand, 151.

⁵ 17 Ves. 533, 558.

as the party came into Equity instead of going to Law, for his own convenience, the rule of law should be adopted, and therefore no costs should be given until the commission ; that the costs of issuing, executing, and confirming the partition, should be borne by the parties in proportion to the value of their respective interests, and that there should be no costs of the subsequent proceedings.”¹

As connected with this subject it may be stated, that, where one of the parties had made a lease of his undivided share, the costs of the lessee, who was a necessary party to the suit for the partition, were thrown exclusively upon the lessor, on the ground that, as such lessee was entitled to his costs, his landlord, who had been the means of bringing him into Court, was the proper person to indemnify him.²

It has been decided, that Commissioners of partition have no lien on the commission for their charges.³

The original decree, directing the commission, usually orders mutual conveyances to be executed by the parties according to their respective interests, after the return of the commission. Until recently, however, when any of the parties were under disability, there was no means by which these conveyances could be executed, and the legal estates could be vested in accordance with the terms of the partition. By the Trustee Act, 1850, the difficulty has been obviated, and it is expressly enacted by the 30th section, “When any decree shall be made for partition, the Court may declare any party to the suit trustee of the lands within the meaning of the Act, and that unborn persons who would on coming into existence become interested, would be trustees within the meaning of the Act ; and, therefore, under the other sections of the Act, vesting orders may be obtained, binding the estates and interests of such persons, born or unborn.” The Court has acted upon these sections in *Boura v. Wright*,⁴ but has, in another case, reserved the question until the infant come of age.⁵

¹ See *Beames on Costs*, 50 ; see also *Calmady v. Calmady*, 2 Ves. jr. 568 ; *Baring v. Nash*, 1 V. & B. 554. See *Phelps v. Green*, 3 John. Ch. 305 ; *Tibbits v. Tibbits*, 7 Paige, 204 ; *Matter of Hemiup*, 3 Paige, 305.

² *Cornish v. Gest*, 2 Cox, 27 ; *Beames on Costs*, 51.

³ *Young v. Sutton*, 2 V. & B. 365.

⁴ *Ante*, p. 156 ; 4 De Gex & Sm. 265.

⁵ *Handcock v. Handcock*, Lords Justices, 1852 ; last edition of *Seton on Decrees*, p. 337.

SECTION IV.

Proceedings under Decrees to settle Boundaries.

IN a suit to ascertain boundaries, the decree generally directs a commission to issue for that purpose,¹ though sometimes the Court will direct an issue, ordering the parties to give a note to each other of their boundaries.²

A commission to settle boundaries partakes very much of the same nature as a commission of partition; it is nearly in the same form, and sued out, executed, and returned in the same manner. There is, however, frequently this difference between commissions to ascertain boundaries and commissions of partition, viz., that, in the case of a partition, the thing to be divided is clearly ascertained and described, whereas in the case of a commission of boundaries, it is often impossible for the Commissioners to ascertain which they are, with sufficient certainty to set them out. To guard against this, when it is through the default of a tenant or copyholder that boundaries are confused, the Court provides for the case of its being impossible to ascertain them, by directing so much of the defendant's own land to be set out, as shall be equal to the quantity originally granted or leased;³ when the commission is of this nature, the Commissioners must proceed accordingly.

It is to be observed, that, in a bill by a prebendary against sev-

¹ Equity has no jurisdiction to settle the title or bounds of land between adverse claimants, unless the plaintiff has an equity against the defendant claiming adversely to him; an equity against other persons will not give jurisdiction. *Stuart v. Coulter*, 4 Rand, 74. As to confusion of boundaries, see 1 Story Eq. Jur. 609 *et seq.*, Ch. 9.

In Connecticut, a Court of Equity will not interfere for the mere purpose of settling a disputed boundary between adjoining proprietors. *Wolcote v. Robbins*, 26 Conn. 236. So in New Jersey, the Court will not entertain a question of boundary between adjoining land owners. *Dickerson v. Stoll*, 4 Halst. Ch. (N. J.) 294.

² *Metcalf v. Beckwith*, 2 P. Wms. 376; see also *Godfrey v. Littel*, 1 R. & M. 62; *Lethieullier v. Lord Castlemain*, Sel. Ca. in Cha. 60; 1 Dick. 46, S. C.

³ *Speer v. Cawter*, 2 Mer. 410, 418; *Willis v. Parkinson*, ib. 507, 510; *Attorney-General v. Fullarton*, 2 V. & B. 263; *Lord Abergavenny v. Thomas*, 1 West, 649; *Seton on Decrees*, 202; *Duke of Leeds v. Earl of Strafford*, 4 Ves. 180.

eral of his lessees for a commission to ascertain the boundaries of his prebendal lands, which had become intermixed with their own lands, Lord Eldon held, that the plaintiff had a right to name as many Commissioners as the defendants.¹

The decree in a suit to settle boundaries does not order mutual conveyances, as in the case of a partition, but directs that, after the lands, &c., have been set out, the defendant is to deliver possession thereof to the plaintiff, and that the plaintiff and his heirs are to hold and enjoy the same against the defendant, or any person or persons claiming under him.²

The consideration of further directions, and of the costs of the suit, has generally in these cases been reserved until after the return of the commission; ³ therefore, when the Commissioners have made their return, the cause will have to be set down for further consideration.

With reference to the costs of suits to settle boundaries, no certain rule appears to be laid down; where, however, it does not appear to have been owing to any default, either in the plaintiff or defendant, that the lands have been mixed or confounded, the Court will direct the costs to be borne by the plaintiff and defendant equally, though the interest of one party is more inconsiderable than the interest of the other.⁴ Where, in a suit to establish the boundaries of a manor, it was ordered that the parties should deliver a note to each other of their boundaries, and that the matter should be tried by a feigned issue, and the result of three different trials was, that the boundaries appeared as they were given in by the defendant, and contrary to what was alleged by the plaintiff's bill, the bill was dismissed with costs, on the ground that the plaintiff might have tried the matter at Law, and that no part of the issue had been found for him.⁵

The decision of the Court with respect to costs will also be influenced by the relation of the parties; and it is to be recollected, that it has been long settled that a tenant contracts (among other obligations resulting from that relation) to keep distinct from his own property during the tenancy, and to leave clearly distinct at

¹ *Willis v. Parkinson*, 1 Swanst. 9.

² *Lord Abergavenny v. Thomas, Seton on Decrees*, 202.

³ See *Seton on Decrees*, 200.

⁴ *Norris v. Le Neve*, 3 Atk. 82.

⁵ *Metcalf v. Beckwith*, 2 P. Wms. 376.

the end of it, his landlord's property, not in any way confounded with his own;¹ if, therefore, it should appear that a tenant has either voluntarily or negligently permitted the boundaries of his own land to get confused with that of his landlord, the Court will, in all probability, compel him to pay the costs of his misconduct or negligence.

SECTION V.

Proceedings under Decrees to assign Dower.

THE Court will not assist a widow in the assignment of her dower, out of her husband's estate, if there is any doubt as to her legal right; therefore, if the title to dower be disputed, it refers to the decision of a Court of Law,² either by directing an issue,³ or by ordering the bill to be retained for a certain time, with liberty to the plaintiff to bring a writ of dower, as she may be advised.⁴

When the right to dower is not disputed, the Court of Chancery assumes a concurrent jurisdiction with Courts of Law,⁵ and will direct it to be assigned.⁶

¹ Attorney-General v. Fullarton, 2 V. & B. 264.

² Lord Red. 121.

³ Mundy v. Mundy, 2 Ves. jr. 122.

⁴ Read v. Read, and Curtis v. Curtis, Lord Red. 122; 2 Bro. C. C. 620, S. C.; D'Arcy v. Blake, 2 Sch. & Lef. 390; Badgley v. Bruce, 4 Paige, 98; Sandford v. McLean, 3 John. Ch. 117; Drickle v. Timrod, 1 Desaus. 109; Wilkin v. Wilkin, 1 John. Ch. 111; Phelps v. Green, 3 John. Ch. 302. See also Johnson v. Johnson, 1 Munf. 554, note; Davison v. White, 2 Munf. 527; Ball v. Ball, 3 Munf. 279; 4 Kent (5th ed.) 71.

⁵ The result of the various decisions upon this subject is, that Courts of Equity will now entertain a general concurrent jurisdiction with Courts of Law in the assignment of dower in all cases. 1 Story Eq. Jur. § 624, c. 12. See also for a full statement of the law on this subject, ib. § 625, 632; Herbert v. Wren, 7 Cranch, 376; Powell v. Monson Manuf. Co. 3 Mason, 347, 459; Swaine v. Perine, 5 John. Ch. 482; Greene v. Greene, 1 Ham. 535; Grayson v. Moncure, 1 Leigh, 449; Kendall v. Hovey, 5 Monroe, 284; Stevens v. Smith, 4 J. J. Marsh. 64; 4 Kent (5th ed.) 71; London v. London, 1 Humphrey, 1, 12. The claim of dower is considered, in New Jersey, as emphatically, if not exclusively, within the cognizance of the Common Law Courts. Harrison v. Eldridge, 2 Halst. 401, 402; Hartshorne v. Hartshorne, 1 Green Ch. 349; Wells v. Beall, 2 Gill & John. 468; Smith v. Eustis, 7 Greenl. 41; Blunt v. Gee, 5 Call, 481; Mayburry v. Brien, 15 Peters, 21.

⁶ Mundy v. Mundy, *ubi supra*.

The right being established, and the property out of which the wife is dowable being ascertained, the next step is to assign the dower. This may be done either by the Court itself in chambers,¹ or by directing a commission to issue.²

A commission to assign dower is nearly in the same form, and is made out, executed and returned in the same manner, as a commission of partition.³

It is to be observed, that, as in the case of settlement of boundaries, it generally forms part of the decree, that when the dower has been assigned, possession shall be delivered to the plaintiff.⁴

The widow is also entitled to an account of the arrears of her dower,⁵ and this, notwithstanding the death of the heir pending the suit, although at Law her right to damages would have been lost by that event.⁶ The widow's right to the rents and profits accrued from the death of her husband is not limited to the time of filing the bill.⁷ Formerly it was held, that the Statute of Limitations, 21 Jac. I. c. 16, did not affect proceedings to recover arrears of dower,⁸ but the recent statute, 3 & 4 Will. IV. c. 27, s. 41, expressly applies to them.⁹

¹ *Meggot v. Meggot*, Seton on Decrees, 261; see also *Tinney v. Tinney*, ib. 262; *Goodenough v. Goodenough*, 2 Dick. 795.

² *Seton on Decrees*, 261; *Wild v. Wells*, 1 Dick. 3; *Huddleston v. Huddleston*, 1 Cha. Rep. 38; *Lucas v. Calcraft*, 1 Bro. C. C. 134; 2 Dick. 594, S. C.; *Mundy v. Mundy*, 2 Ves. jr. 125; 4 Bro. C. C. 295, and the commission in *Seton on Decrees*, 263.

³ Ante, Sect. III.

⁴ *Meggot v. Meggot*, *Seton on Decrees*, 261; *Goodenough v. Goodenough*, 2 Dick. 795.

⁵ See *Hazen v. Thurber*, 4 John. Ch. 604; *Newbold v. Ridgeway*, 1 Harring. 55; *Chase's Case*, 1 Bland, 206; *Keith v. Trapier*, 1 Bailey Ch. 63; *Swaine v. Perine*, 5 John. Ch. 487, 488; *Davis v. Logan*, 9 Dana, 187. As to her right to rents and profits, against the alienee of her husband, see *Sillman v. Bowen*, 8 Gill & John. 50; *Rickard v. Talbird*, Rice Eq. 159; *Gordon v. Stevens*, 2 Hill Ch. 429; *Marshall v. Anderson*, 1 B. Monroe, 199; *Kendall v. Hovey*, 5 Monroe, 284; *Russell v. Austin*, 1 Paige, 192; *Whitehead v. Bellamy*, 2 Hayw. 240; *Wood v. Lee*, 5 Monroe, 57; *Golden v. Maupin*, 2 J. J. Marsh. 240; *Johnson v. Thomas*, 2 Paige, 377; *Steiger v. Hillen*, 5 Gill & John. 121; *Tod v. Baylor*, 4 Leigh, 498.

⁶ *Curtis v. Curtis*, 2 Bro. C. C. 620; see *contra*, Lord Red. 122.

⁷ *Curtis v. Curtis*, *ubi supra*; *Mundy v. Mundy*, 2 Ves. jr. 122; *Oliver v. Richardson*, 9 Ves. 222.

⁸ *Ibid.*

⁹ Ante, p. 678.

It may be mentioned here, that interest will not be allowed on arrears of dower.¹

When the assignment has been directed to the Master, the same decree may direct the account of rents and profits,² but where the assignment of dower is by commission, it must be deferred till the cause comes on for further directions.

Lord Redesdale observes, that "in the two cases of partition *and assignment of dower*, as no costs can be given in a Court of Common Law upon a writ of partition or a writ of dower, no costs have commonly been given in a Court of Equity upon bills for the same purposes";³ and, as respects dower, this appears to be the present rule of the Court, in cases where the widow comes into Court for the single purpose of having dower assigned her.⁴ The rule, however, is subject to exception where previous questions are raised, in litigating of which the party is vexatious;⁵ therefore, where the widow had, without any just pretence, been kept out of her dower, costs were given her.⁶ In *Meggot v. Meggot*,⁷ also, the Court appears to have awarded the widow her costs, up to the time of the decree.⁸

SECTION VI.

*Proceedings in the Master's Office.*⁹

ACCORDING to the ancient practice of the Court, all references to a Master used to be made to one of the two Masters sitting in Court, as assistants to the Lord Chancellor or Master of the Rolls,

¹ *Lindsay v. Gibbon*, cited 3 Bro. C. C. 495; *Wakefield v. Childs*, 1 Fonb. 23.

² *Meggot v. Meggot*, *ubi supra*.

³ Lord Red. 122.

⁴ *Lucas v. Calcraft*, 1 Bro. C. C. 134; see also Sir S. Romilly's note of the same case, *ib. ed. Belt (n)*.

⁵ *Lucas v. Calcraft*, *ubi supra*.

⁶ *Worgan v. Ryder*, 1 V. & B. 20; Beames on Costs, 36.

⁷ Seton on Decrees, 261.

⁸ But see *Outhwaite v. Outhwaite*, referred to by Mr. Beames in his Treatise on Costs, 36, note 5.

⁹ The office of Master in Chancery has been abolished in England; but this section, in reference to the proceedings in the Master's office, has been retained in this edition because the office still exists in many of the United States. The Master's office is a branch of the Court; and, it seems, the Master has power to

when the reference was made;¹ but the modern practice, where there had been no previous reference, was to refer it "*to the Master in rotation*," and, where there had been a previous reference, "*to the Master to whom this cause stands referred*."²

It may be mentioned, in this place, that after a cause has been referred to a Master, it cannot be withdrawn from that Master without an order of the Court, and that such an order will not be made unless on very special occasions, such as the incapacity of the Master, from illness, to attend to the business, which, to justify such a removal, must be shown to be of a very urgent nature. In one case, it appears, that Lord Eldon directed a cause to be removed on the allegation of counsel, that he found the Master in such a state, from his advanced age and infirmity, that it was not proper to go into the business before him.³ Sometimes where the Master has died and a successor has not been appointed, the Court will make an order that the cause, if the matter of the reference requires immediate attention, should be transferred to another Master.⁴ And it occasionally occurs that, where it is very important to the interests of the parties that some particular branch of a cause in a Master's office should be proceeded with during the long vacation, the Court will make an order directing that branch of it to be referred to the "Vacation Master."

control the proceedings of parties before him. *Stewart v. Turner*, 3 Edw. Ch. 458. In reference to a Master's fees and allowance for his services, see *Woodruff v. Straw*, 4 Paige, 407.

¹ Prac. Reg. 363; where a reference is made for the examination of Court Rolls, touching any custom, it should not be to any one Master but to two at the least. *Ibid.*

² The Circuit Courts of the United States may appoint standing Masters in Chancery in their respective districts, both the Judges concurring in the appointment; and they may also appoint a Master *pro hoc vice* in any particular case. United States Equity Rule, 82. It is improper for a Master to perform any official act, as Master, in a cause in which he is solicitor, or partner of the solicitor. *Brown v. Byrne*, Walk. Ch. 453.

When a notice was to appear before A, a Master, and the return was by B, a Master, that the defendant did not appear, it was held to be irregular. *Whipple v. Brown*, Harring. Ch. 436. Where one Master has begun proceedings under an order of reference, they should be completed by him, and the party obtaining the order cannot transfer the proceedings to another Master to be completed. *Bishop v. Williams*, Walk. Ch. 423.

³ Anon. 9 Ves. 341.

⁴ In one case it appears that upon the death of a Master, a general order was made, that all matters referred to him should be transferred to another. Prac. Reg. 165.

Conduct of the Cause.

The prosecution of the decree devolves upon the plaintiff, he being considered, in most cases, as the person principally interested in forwarding it. A reference upon an interlocutory order¹ is, for the same reason, usually prosecuted by the party obtaining it, whether plaintiff or defendant.²

In order, however, to prevent delay in the prosecution of the decree, it is provided, by the 48th of the Orders of 1828, "That where any decree or order referring any matter to a Master, is not brought into the Master's office within two months after the same decree or order is *pronounced*, then any party to the cause, or any other party interested in the matter of the reference, shall be at liberty to apply to the Court by motion or petition, as he may be advised, for the purpose of expediting the prosecution of the decree or order."

It is provided, by the 56th of the same Orders, "That where the party actually prosecuting a decree or order, does not proceed before the Master with due diligence, then the Master shall be at liberty, upon the application of any other party interested, *either as a party to the suit, or as one who has come in and established his claim before the Master, under the decree or order*, to commit to him the prosecution of the decree or order, and that, from thenceforth, neither the party making default nor his solicitor shall

¹ When an account is ordered the decree is interlocutory in regard to the details. *Humphrey v. Foster*, 13 Grattan (Va.) 653.

² *Quackenbush v. Leonard*, 10 Paige, 131; *Biddulph v. Fitzgerald*, Sausse & S. 434; *Holley v. Globet*, 9 Paige, 9. As a general rule, the party obtaining a reference is entitled to the prosecution thereof in the first instance; and where reference is directed at a hearing in which both parties have an interest, it is to be prosecuted by the solicitor of the plaintiff; and in either case, the adverse party has no right to carry the decree to the Master's office until the prosecution of the reference has been committed to him, either upon default of the party originally entitled to the prosecution, or by a provision in the decree directing the reference. *Quackenbush v. Leonard*, *supra*. In the Circuit Courts of the U. States, whenever any reference of any matter is made to a Master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the Master for a hearing on or before the next rule day succeeding the time when the reference was made; if he omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the Master, at the costs of the party procuring the reference. Equity Rule, 74.

be at liberty to attend the Master as the prosecutor of the decree or order."

Previously to the above Order, however, in creditors' suits especially, the practice of the Court had been, in case the party whose business it was to prosecute a decree, neglected his duty, to allow a party interested as a creditor to obtain an order to prosecute it in his stead;¹ and it seems that the Court will still exercise its authority, by taking the prosecution of a decree from the plaintiff and intrusting it to another, and that even after the Master has exercised his judgment upon it, and has refused an application under the 56th Order above mentioned.² In *Cook v. Bolton*,³ such an order was made, notwithstanding the suit was abated by the death of a defendant, and Lord Lyndhurst refused to discharge it.⁴

Applications to the Court, of the nature above pointed out, may be greatly facilitated by the operation of the 57th Order, of 1828, which directs "That, upon any application made *by any person* to the Court, the Master, if required by the person making the application, shall, in as short a manner as he conveniently can, certify to the Court the several proceedings which shall have been had in his office in the same cause or matter, and the date thereof."

Of Warrants.

Before we proceed to examine the course of proceeding before a Master in specific cases, it is proper to direct the attention of the reader to certain points relating to the Master's office, which are common to all references. The first of these points which suggests

¹ *Creuze v. Hunter*, 2 Ves. jr. 157, 165; see also, *Sims v. Ridge*, 3 Mer. 358; *Powell v. Walworth*, 5 Mad. 31; *Fleming v. Prior*, 2 Mad. 183; *Edmonds v. Ackland*, 5 Mad. 423.

² *Wyatt v. Sadler*, 5 Sim. 450.

³ 5 Russ. 282.

⁴ It is to be observed, that the abatement in the above case was occasioned by the death of a defendant, so that the suit was not entirely abated; and that the order was supported principally on the ground that application for it was not so much a proceeding in the cause, as an application to authorize the party to take proceedings in it. When the abatement is occasioned by the death of the plaintiff, the application should not be, that the creditor may be at liberty to prosecute the decree, but for permission to file a supplemental bill, in case the representative of the plaintiff does not file a bill of revivor, within a limited time, and to serve the order on such representative. *Dixon v. Wyatt*, 4 Mad. 393; see post, Abatement and Revivor.

itself, is the method of bringing the parties who are interested in the subject-matter before the Court.

This is done by means of "*a warrant*," which is a mere memorandum, upon a slip of paper, entitled in the cause, and signed by the Master, appointing a day and hour for all parties concerned to attend him on the matter of the reference; it is generally in this form: — ¹

By virtue of an order of reference, I do appoint to consider the matters thereby to me referred, on next, at of the clock, in the noon, at my Chambers in Southampton Buildings, Chancery Lane, at which time and place all parties concerned are to attend.

S. C. Cox.²

Dated the day of 1830.

This warrant is obtained from the Master's clerk, by the solicitor applying for it, who underwrites a memorandum expressing the object of it; after which copies of the warrant are served on the solicitors of all parties who are entitled to attend the Master upon the reference.³

There must be at least one clear day between the day of issuing the warrant and the day appointed by it for the attendance of the parties thereon; thus on Thursday for Saturday, Saturday for Tuesday, &c.⁴

¹ By the United States Equity Rule, 75, upon every reference of a matter to a Master, to examine and report upon, it shall be his duty, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the Master shall be at liberty to proceed *ex parte*, or in his discretion to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the Master to proceed with all reasonable diligence in every such reference, and with the least practicable delay; and either party shall be at liberty to apply to the Court or a Judge thereof, for an order to the Master to speed the proceedings, and to make his report, and to certify to the Court or Judge the reasons for any delay.

² Bennett's Practice, Appx. 1.

³ As to the parties who are entitled to attend the Master, see post, p. 1149.

⁴ 1 Newl. 324; 2 Smith, 116, 3d ed. The time to prepare for a hearing, after notice given to the parties by a Master in Chancery, is left in the discretion of the Master, but it should be a reasonable notice. *Bernie v. Vandever*, 16 Ark. 616. Notice to appear on the day the case was referred, in a few hours, between 8 and 12 P. M., was held to be so unseasonable that the report should be set aside. *Bernie v. Vandever*, *supra*.

This rule, however, does not apply to special applications under the 3 & 4 Will. IV. c. 94, s. 13 ; or under the Orders made in pursuance of that Act, which must be served at least two clear days before the return thereof.¹ In the case of a warrant *to sign a report*, it is necessary that there should be three clear days between the day of service and the time appointed by the warrant.²

It is to be observed, that, wherever a state of facts, charge or claim, or other document, is left at the Master's office, the solicitor leaving it takes out a warrant, which he underwrites "*on leaving the state of facts,*" &c. This is termed a "*warrant on leaving,*" and is served in the usual manner, but it is considered a mere formal one, to afford the opposite party an opportunity of obtaining a copy of the document left, that he may either admit or contest the circumstances there stated, as he may be advised.³

After the return of this warrant, another is obtained, which is underwritten, — "*to proceed on the state of facts,*" &c. This is called a "*warrant to proceed.*"⁴ This must also be served as other warrants, and is *peremptory*.⁵

On the attendance, by all parties, before the Master, at the time specified in the warrant, he proceeds to consider the matter referred to him ;⁶ and, if the matter cannot be got through upon the first attendance, other warrants to *proceed* must be sued out and served till the matter is complete. It is to be observed, however, that if a further affidavit, in support of any proceeding before the Master is left, and a warrant on leaving is taken out, the warrant "*further to proceed*" must not be returnable, until three clear days after the further affidavit was left.⁷

It is to be observed that, on every attendance, the Master or his clerk marks in his book the names of the solicitors who attend,

¹ 20th Order, 1833.

² 2 Smith, 3d ed. 117.

³ Ibid. See *Manhattan Co. v. Evertson*, 4 Paige, 276.

⁴ Ibid. It is said that the Masters, with one exception, allow a party to take out a warrant to proceed at the same time as the warrant on leaving, provided the return of the warrant to proceed is not made earlier than it would have been, if taken out after the return of the warrant on leaving, 2 Smith, 3d ed. 117.

⁵ 59th Order, 1828.

⁶ By U. States Equity Rule, 77, the Master must regulate all the proceedings in every hearing before him, upon every reference of a matter to examine and report thereon.

⁷ 2 Smith, 3d ed. 119.

and that no other attendance than those so marked will be allowed in costs. It is therefore necessary, for the solicitor to be careful that his attendance is marked, lest the Master or his clerk should omit to do it in the hurry of business.¹

In general, the time allowed by the Masters for hearing upon each warrant, does not exceed an hour, but, by the 59th Order, before referred to, the Master is at liberty to continue the attendance beyond the hour, and during such time as he thinks proper, and he is empowered to increase the fee of the solicitor's attendance, in proportion to the time actually occupied.

The same Order also directs, that, in case the Master shall not be attended by the solicitor, or a competent person on behalf of the solicitor, of any party, the Master shall, in such case, disallow the usual fee for the solicitor's attendance, taking care either in allowing the increase fee or disallowing the usual fee, to mark his determination in his attendance book, and also on the warrant for attendance.

Formerly a Master could not proceed with a reference *de die in diem*, without a special order from the Court giving him liberty to do so;² but now, by the 58th Order of 1828, "every Master is at liberty to proceed in all matters *de die in diem* at his discretion."

In such cases, as there will be no intermediate time for the service of the usual warrants to proceed, the Master must, on each day, fix the time for the next attendance of the parties.

It is to be observed, that the Order above referred to leaves it to the Master's discretion to decide whether he will proceed *de die in diem* or not.

Under the old practice, the attendance of a party upon a warrant was not required of him until the second, and in most cases, not before a third, warrant had been served upon him,³ but now every warrant for attendance before the Master is to be considered *peremptory*,⁴ and the Master may, upon the *non-attendance* of the party, proceed in his absence *ex parte*.⁵ For this purpose, he must administer an oath to the person who served the warrant, of the same having been duly served, and then proceed on the business of the warrant.⁶

¹ 1 Turn. & V. 338.

² Purcell v. M'Namara, 11 Ves. 362.

³ 1 Newl. 324.

⁴ 59th Order, 1828.

⁵ See U. States Equity Rule, 75; New Jersey Chancery Rule, III. § 2.

⁶ 1 Newl. 324.

The form of the oath made on this occasion is indorsed by the Master's clerk upon the warrant ;¹ and it is to be observed, that the service of the warrant on leaving requires to be proved as well as that of the warrant to proceed.²

If a warrant has been served on *a party* in the country, the service may be proved by the affidavit.³

The proceeding *ex parte* is not confined to cases where there is only one party who ought to attend, but makes default, for, by the 53d Order, of 1828, it is directed, "That, where some or one but not all the parties do attend the Master at an appointed time, whether the same be fixed by the Master personally, or upon a warrant, then the Master shall be at liberty to proceed *ex parte*, if he thinks it expedient, considering the nature of the case, to do so."

It is also provided, by the 54th Order, "That, where the Master has proceeded *ex parte*, such proceeding shall not in any manner be reviewed, unless the Master, upon a special application made to him for that purpose by the party who was absent, shall be satisfied that he was not guilty of any wilful delay or negligence, and then only upon payment of all costs occasioned by his non-attendance, such costs to be certified by the Master at the time, and paid by the party or his solicitor, before he shall be permitted to proceed on the warrant to review."

By Lord Coventry's Orders it is provided that, "If the case be such that the Master cannot proceed in the absence of either party or his counsel without just cause absents, the Master is presently to certify this Court of the default, that the defaulter may be punished by commitment, costs, or otherwise, as the Court shall direct";⁴ and now, by the 55th Order, of 1828, it is further provided, "That where a proceeding fails, by reason of the non-attendance of any party or parties, and the Master does not think it expedient to proceed *ex parte*, then the Master is at liberty to certify what amount of costs, if any, he thinks it reasonable to be paid to the party or parties attending, by the absent party or parties, or by his or their solicitor or solicitors personally, as the Master in his discretion shall think fit: and, upon motion, or petition without notice, the Court will make an order for the payment of such costs accordingly."

¹ 2 Smith, 3d ed. 118.

² Ibid.

³ Ibid.

⁴ Beames's Ord. 79.

Parties Entitled to Attend.

The party conducting the cause in the Master's office must take care that all parties entitled to attend any proceedings under the decree or order, have due notice by service of warrants in the manner before stated. Who these are, where the parties are numerous and their interests complicated, is not always an easy task to ascertain, and it is conceived that the following general rules upon the subject, which are to be found in a recent Treatise by an Officer of the Court, which has been frequently referred to in the foregoing pages, will be useful to the practitioner in pointing out to him the parties upon whom he ought to serve his warrants.

The general rule of the Court appears to be, that all parties beneficially interested, either in the estate or in the fund in question, are entitled to attend before the Master on all those proceedings which may affect their interests, or increase or diminish their proportion in the fund: thus all parties entitled to a distributive share of a residue are entitled to attend on those proceedings which tend to increase or diminish the residuary fund.¹ The only exception to this rule appears to be the case of a reference to the Master of the title to an estate purchased under a decree, in which case the Master will only allow the vendor's solicitor to attend before him on the inquiry.²

This rule, however, is subject to some limitations, if the fund distributable under a will is sufficient, — thus, general legatees only are allowed to attend on those proceedings which strictly affect or relate to their legacies, and not on the general proceedings; but if the fund is not sufficient to pay the legacies in full, they are entitled to attend all proceedings which relate to or may affect the fund out of which they are to be paid.³ Parties entitled only to the personal estate are not entitled to attend those proceedings which affect the real estate alone; and the converse of the rule prevents those interested solely in the real estate from interfering with proceedings relating exclusively to the personal estate, supposing always that these proceedings have no collateral bearing on each other; for if either fund may be affected by the

¹ 2 Smith, 3d ed. 111.

² Ibid. 112.

³ Ibid.; see also, *Chillingworth v. Chillingworth*, cited ib. p. 216.

deficiency of the other ; each party may be indirectly interested in both, and is then entitled to attend.

An executor, as the legal representative of his testator, is entitled to attend on all proceedings relating to the charges of creditors seeking payment out of the personal estates ; but, after there has been a report of debts, if all the parties interested in the personal estate are before the Court, he is only entitled to attend on those proceedings in which he is personally interested as an accounting party.¹

Trustees are not allowed (except in proceedings carried on by themselves) to attend before the Master in cases where all the *cestui que trusts* are before the Court ; but if there are any parties in *esse*, or who may come into *esse*, who may become interested, and whose interests are only represented by the trustees, and are not too remote, the trustees will be entitled to attend the proceedings affecting those interests.²

Parties having charges on an estate or on a fund, are, if the estate or fund is sufficient, entitled only to attend on the proceedings brought in by themselves ; but if there is a deficient fund, each incumbrancer is entitled to attend on the charges of those incumbrancers who claim a priority over him, but not on those who do not charge to be of a prior date to his security.³ The same rule applies to creditors coming in to prove their debts under a decree.⁴

The above restrictions are adopted for the purpose of protecting the party, or the funds upon which the costs of the suit will eventually devolve, from being put to expense, by the unnecessary attendance of parties before the Master ; and the application of them is generally regulated by the Master to whose discretion it is left. By the 51st Order of 1828, the Master, strictly speaking, is bound, where it can be done, to point out, at the attendance upon the warrant, to consider the course of proceedings under the decree, who the parties are that are entitled to attend him, and, in cases where he may be in a situation to do so, at such attendance, it is very desirable that the terms of the order should be complied with. It is obvious, however, that in many cases, this would be impracticable ; but as the Order does

¹ 2 Smith, 3d ed. 112.

² Ibid.

³ Ibid. 113.

⁴ Hare v. Rose, 2 Ves. 558.

not preclude the discussion of this point at any future stage of the proceeding, and the Master may, at any time, entertain an objection to a party attending before him, on the ground, that his interest does not entitle him to do so at the risk of throwing the expense of his attendance upon the fund or the party to be charged with the costs. If the Master, upon an objection being made to the attendance of a party before him, is of opinion that such attendance is inadmissible, he may refuse to mark the attendance of the solicitor of the party in his book, which will have the effect of depriving such solicitor of the costs of such attendance upon the general taxation of the costs.

If the Master should be considered to have come to an improper conclusion in not allowing a party to attend before him, the proper course to obtain the opinion of the Court upon the point would be, to present a petition praying that the party might be permitted to attend the Master. On one occasion, an application by motion appears to have been made to the Court on the ground that the Master had refused to mark in his book the attendance of a solicitor, and the motion was ordered to stand over, that the Lord Chancellor might see the Master, when the object of the motion appears to have been obtained, and it was not mentioned again.¹

It is to be noticed, in this place, that the Master has not only the power of restricting the attendance of parties or their solicitors before him, in the manner before stated, but he is also empowered in certain cases, to extend them. By the 77th of the Orders of 1828, it is provided, that "whenever, in any proceeding before a Master, the same solicitor is employed for two or more persons, such Master may, at his discretion, require that any of the said parties shall be represented before him by a distinct solicitor, and may refuse to proceed until such party is so represented."

The rule that all parties interested in the result are entitled to attend before the Master, applies not only to those who are parties to the record, but to those who are *quasi* parties, by having come in under the decree and established a claim, who, subject to the rules before pointed out,² are entitled to notice of all proceedings which affect their interests. We have before seen,³ that in such cases service upon the solicitor in London, by whom such

¹ 2 Turner & V. 215.

² Ante, p. 1149.

³ 44th Order, 1828, ante, p. 446.

party appears, is made good service, except in cases requiring personal service.

The general rule, that all persons having an interest in the result of the proceedings should have notice of the attendance before the Master, extends to cases in which a defendant, after appearance to the subpœna, has allowed the bill to be taken against him *pro confesso*, and a decree to be made, for want of an answer. In such cases, as well as in cases where the decree has been made upon the answer of the party, it is necessary to serve him with warrants upon all proceedings, in the Master's office, by which his interests are in any way affected.¹

It is to be remembered that a distinction exists in this respect between decrees *pro confesso* under the statute for want of appearance, and decrees *pro confesso* for want of an answer. In the former, there being no one whom the plaintiff can serve, all the necessary proceedings must necessarily be *ex parte*.²

But although a party who has appeared, but has allowed a decree to be taken against him *pro confesso* for want of an answer, is entitled to have notice of the proceedings against him under the decree in the Master's office, he will not be entitled to appear upon such notice before the Master, without previously obtaining an order for that purpose.³ This order will not be granted except upon terms, and in *Heyn v. Heyn*,⁴ Lord Eldon refused to permit the defendant to attend the Master upon the accounts directed by the decree, unless upon the terms of his paying all the costs of the suit, including the costs of his contempt up to the time of making the order.

Parties who are entitled to attend upon the Master, are entitled to take copies of all proceedings in writing brought into the Master's office, which in any way affect their interest, and will be allowed the costs of such copies in taxation. Thus, if interrogatories are exhibited for the examination of an executor, or other accounting party, or his examination is left, or if a debtor or creditor account, or charges and discharges arising out of either, or charges or claims of creditors or others, are brought in, all the parties to

¹ *King v. Bryant*, 3 M. & C. 191; see also *Dominicetti v. Latti*, 2 Dick. 588; ante, p. 728.

² *Thompson v. Trotter*, cited 3 M. & C. 183; and see *Eltoft v. Brown*, 2 Hare, 618.

³ *Heyn v. Heyn*, Jac. 49.

⁴ *Ubi supra*.

the suit, liable to be affected by the results of these accounts or claims, are entitled to take copies of them.¹

Formerly, no person was at liberty to object to or defend the proceedings before the Master upon any account, or taxing of costs, but such of the parties as should actually pay for an office copy of such accounts, or bill of costs from the Master,² and the same rule extended to all other proceedings in the Master's office upon which a party appeared. By 3 & 4 Will. IV. c. 94, s. 19, however, it has been enacted, "That no person shall be compelled or required to take or pay for any copy of any paper or document in the office of any Master in ordinary, and that every person shall be at liberty to take a copy of such part only as he may require of any paper or document being in the office of any such Master, and of any interrogatories being in the office of either of the Examiners of said Court; *provided always*, that, in taxation of costs as between *party and party*, or as between *solicitor and client*, no person shall be allowed the costs of the copy of any paper or document originating in the Master's office, or brought in before a Master, unless such copy shall have been either made in the Master's office, or transcribed from a copy made therein and taken by the party claiming to be allowed the costs of such second or other copy, or unless such copy should have been made for the use of any Master, or of the Court, or by the desire or for the use of the client or clients claiming to be paid for such copy."

The right to take copies of proceedings in the Master's office extends not only to the copies of such matters brought in by the plaintiff, but to such as are brought in by the co-defendants; and, in fact, the right is solely regulated by the influence of the proceeding upon the estate or fund, and the interest of the party claiming to attend in the result of that proceeding.³

Production of Documents.

Almost every decree which directs a reference to the Master, either to make inquiries or to take accounts, contains the following direction: "And for the better (*taking the said account and*) discovery of the matters aforesaid, the parties are to produce, before the said Master, upon oath, all deeds, (or books,) papers, and writ-

¹ 2 Smith, 111, 3d ed.

² 5 Harr. 474.

³ 2 Smith, 112, 3d ed.

ings, in their custody or power, relating thereto, and are to be examined upon interrogatories as the Master shall direct.”¹

The discretion conferred upon the Master by the words of the decree was, under the old practice, in many respects very limited in extent; consequently, by the 60th Order of 1828, it was directed, “That where by any decree or order of the Court, books, papers, or writings are directed to be produced before the Master, for the purposes of such decree or order, it shall be *in the discretion of the Master* to determine *what* books, papers, and writings are to be produced;”² and when and for how long they are to be left at his office, or, in case he shall not deem it necessary that such books, papers, and writings should be left or deposited in his office, then he may give directions for the inspection thereof, by the parties requiring the same, at such time and in such manner as he shall deem expedient.”³

It is to be observed, that under the above Order, the Master has a right to require, by his warrant, that all such documents as he shall think proper shall be left in his office, and that a refusal to leave them in pursuance of such a warrant, is considered as a disobedience of the original order of the Court directing their production, and may be treated accordingly.⁴

The mode of proceeding to enforce the production and deposit of documents, is by taking out and serving a warrant in the usual form, underwritten to the following effect: — “at which time the defendant is to produce before me, and deposit in my office all such deeds, books, and papers as are in his custody or power relating to the matters referred to me.” If any particular document should have been mentioned in any answer or examination, or in any schedule or other proceeding, they may be referred to in the underwriting to the warrant;⁵ but it is to be observed, that a party

¹ Seton on Decrees, 11. See *Hart v. Ten Eyck*, 2 John. Ch. 513; *Russell v. McLellan*, 3 Wood. & Minot, 157. Under the U. States Equity Rule 77, the Master may require the production of all books, papers, writings, vouchers, and other documents applicable to the matter referred.

² This discretion of the Master is limited by the rules which guide the Court in compelling a discovery and production of documents in other cases; see post, “Interlocutory Applications for the Production of Documents.”

³ This Rule is precisely similar to that heretofore existing in New York. Rule 103, in Chancery.

⁴ *Shirley v. Earl Ferrers*, 1 M. & C. 304. See *Wells v. Glen*, N. York, in Chancery, Jan. 16, 1839.

⁵ *Bennett's Prac.* 78.

can only be ordered to bring in documents specified in any pleading or examination or schedule, or other proceeding, in cases where such pleading, &c., can be read as an admission against such party, and that the Master's certificate of a defendant's default in the production of papers, founded on an admission contained in the answer of another party, will be irregular.¹

If the party is prepared to bring in such deeds, &c., as may be in his possession, custody, or power, a schedule of them should be made out, and an affidavit that the items contained in such schedule, are the only deeds, &c., in the party's custody or power relating to the matters in question, having been sworn, it is deposited, together with the deeds, &c., in the Master's office, and of this the Master grants a certificate.² It is to be observed, that the certificate of the Master, of the production of the deeds, &c., is merely confined to the fact of the deeds, &c., mentioned in the affidavit having been produced by the party; it does not go on to certify whether the Master is satisfied with the production, nor is it usual to call upon the Master to make such a certificate.³ The most convenient course, if there is reason to suppose that the defendant has not made a full disclosure, is to apply for leave to exhibit interrogatories for his examination, supporting the application by an affidavit, stating the papers which he ought to produce, &c.⁴

If the party is not prepared to bring in the documents required, his solicitor should attend, upon the return of the warrant, and apply for time to do so according to the circumstances; ⁵ or, if he wishes to take the Master's opinion, under the discretionary power above referred to, as to whether all the documents, &c., should be

¹ *Kemp v. Wade*, 2 Keen, 687.

² Bennett, 79.

³ *Cotton v. Harvey*, 12 Ves. 391. Upon the books, &c., being produced before the Master, those parts which do not relate to the subject of the litigation may be sealed up. And it is contempt of the Court for the adverse party to break open the parts thus sealed up. *Dios v. Merle*, 2 Paige, 294.

⁴ *Ibid.* 393; *sed query*, whether the interrogatories may not be exhibited in the Master's office, for the examination of the party, without leave of the Court? If there is reason to suppose that the party has not made a full disclosure, all parties interested in the production or delivery of the books, &c., may examine such party as to the fact whether the order of the Court has been fully and fairly complied with. *Hallett v. Hallett*, 2 Paige, 432. In such cases the Master should allow a reasonable time to inspect the books and papers delivered, and to prepare interrogatories for the examination of the party, if necessary. *Ib.*

⁵ Bennett, 79; and see *Stnbs v. Sargon*, 4 Beav. 90.

produced, he should attend the warrant for that purpose, when the Master will direct what documents are to be produced, and fix a time for bringing them in. It seems to be the practice of some Masters, on the return of the warrant, to direct the party, instead of producing the books, to leave an affidavit of what books, papers, &c., he has in his possession, custody, or power, from which the Master will direct the production of such of them as are necessary.¹

If a party, ordered to produce documents before the Master, requires further time to enable him to do so, and the Master is not disposed to extend it, he may apply to the Court, by motion,² and having obtained time, he may apply for and obtain a still further extension of time.³ He must, however, make such application before he is in contempt; that is, before the period limited by the order *nisi* for the production of the documents has expired, before which time he will not have incurred any contempt, and will not be liable to the costs of the certificate of default or of the order *nisi*.⁴

It seems, also, that the Court will entertain a similar motion, to dispense with the production of the documents, upon giving inspection at the house or counting-house, &c., as in the case of an interlocutory for production.⁵

It may be mentioned in this place, that it is the practice of the Bank of England, whenever it is necessary for the purpose of answering the inquiries directed by a decree, that the Bank books, &c., should be inspected, to permit such inspection, upon production of a certificate by the Master, that such inspection is necessary.⁶ Such inspection, however, will not be allowed, unless upon the production of the Master's certificate, nor will the Court make an order upon the Bank to permit it.⁷ It seems, however, that in case the Master refuses to sign such a certificate, the Court itself, upon a proper case being laid before it, will grant one.⁸

¹ 2 Smith, 3d ed. 168.

² See Hand, 132.

³ Ibid.

⁴ 2 Smith, 132.

⁵ Jones v. Powell, Seton on Decrees, 421; *ex relatione* Tinney; see post, Ch. on Production of Documents.

⁶ Brace v. Ormond, 1 Mer. 412.

⁷ Ibid.

⁸ Ibid. Orders have frequently been made by the Court, for leave to inspect the books of the Bank and South Sea Company, for the purpose of the suit, although the Bank, &c., were not parties. See Whorwood v. Scott, Seton on Decrees, 23; Lethienllier v. Tracy, ib. 24; and also City of London v. Thomson, 3 Swan. 265, note.

If upon the return of the warrant for the production of documents, the party neither produces them nor attends the Master to ask for further time, or to take his opinion upon the propriety of limiting the production, under the discretionary power before referred to; or if, having obtained an extension of time from the Master or from the Court, or having attended the Master upon the return of the warrant, and obtained a limited order for production, (upon which occasion the Master will, as we have seen, fix the time when such production ought to be made,) the party fails to produce the documents within the time limited, the party requiring the production may proceed to enforce it by application to the Court.

For this purpose, he should obtain from the Master a certificate of the default, and upon that being signed,¹ a motion may be made that he may produce the documents within four days after service of the order upon the clerk in Court, or that the Sergeant-at-arms may go against him, and bring him to the bar of the Court to answer his contempt; this is called the four-day order.²

In *Jones v. Powell*,³ Sir A. Hart appears to have held, that the Master's certificate, as to the production of books, &c., is one which cannot be excepted to; and that, if any objection exists to it, the proper course is to move, on affidavit, that the certificate may be quashed. In *Chennell v. Martin*,⁴ however, the V. C. of England seems to have considered this opinion as wrong, and to have

¹ An Order of the Court, dated the 29th October, 1692, Beames's Orders, 292, directs that all reports and certificates shall be filed *within four days after the signing thereof*, and that all proceedings which shall be grounded on any report or certificate not filed as aforesaid, shall be utterly void and of none effect; but, notwithstanding this order, the practice, in cases of certificates of default, appears to be, to apply to the Court for the four-day order, on the day when the certificate bears date, (so as to leave no interval within which the party may obey the decree,) and to file the certificate afterwards, taking care, however, not to proceed upon the *four-day order* until after the filing of the certificate. Indeed, the Registrar in fact never delivers out the four-day order, until the certificate has been filed; *Harris v. De Tastet*, 1 S. & S. 263; see also *Eyles v. Ward*, 2 P. Wms. 517; *Askew v. Peddle*, 10 Sim. 182.

² Seton on Decrees, 420. In the case of a peer or member of Parliament, the order should be, that he may produce, &c., or that, in default, *a sequestration may issue*. The same course of proceeding is proper, in the case of a corporation aggregate, see Seton on Decrees, 428; and, in either case, upon the Master's second certificate of default, the order for the sequestration will be made absolute. *Ibid.*

³ 1 Sim. 387.

⁴ 4 Sim. 340.

determined that, in such and all other cases where the objection to the report does not appear on the face of it, if a Master certifies adversely, the objection to his report or certificate should be made by exception, and not by motion or petition ; but in a more recent case, *Kemp v. Wade*,¹ Lord Langdale, M. R., stated, that the Masters had represented to him, that the mode of proceeding in cases of a certificate of default, in not producing deeds, &c., is *for the party applying for the production to obtain the usual four-day order, and then for the other party to apply to the Court to discharge the order, and take the certificate off the file.*

It may be mentioned here, that the certificate of a Master as to the non-production of documents, cannot be contradicted ; and that, where the Master certified that the writings were not delivered in, but the clerk in Court offered to prove that they were delivered in, the Court would not suffer any averment to be made contrary to the certificate.²

The four-day order does not require personal service, and therefore may be served upon the solicitor of the defaulting party ;³ and, upon further certificate of default, it will be made absolute, for which purpose another motion must be made in the Court.⁴ This is the motion of course, and may be made without notice, but the certificate of default must bear date on the day of the motion being made,⁵ and must be filed before the order is delivered out.⁶

This order must be executed by the Sergeant-at-arms, in the same manner that other orders of that nature are executed by the same officer ;⁷ and if he returns *non est inventus*, a sequestration will issue against the estate and effects of the party in default.⁸

If the Sergeant-at-arms succeeds in arresting the party, he must

¹ 2 Keen, 687.

² Sel. Ca. in Cha. 5 ; 2 Harr. ed. Newl. 494, n. ; see post, Exceptions to the Master's Report.

³ *Hobson v. Sherwood*, 6 Beav. 63 ; and ante, p. 512. Where a defendant was a prisoner in the Fleet, it was ordered that he should produce the books, &c., before the first day of the next term, or be confined a close prisoner in the prison ; and, upon the Master's certificate of non-production, a sequestration *nisi* was ordered against him, which was afterwards made absolute. *Detillin v. Gale*, 1 S. & S. 275, note.

⁴ *Carleton v. Smith*, 14 Ves. 180.

⁵ *Ibid.* ; *Hopkinson v. Leach*, 8 Swanst. 98.

⁶ See ante, p. 1157, n. 1.

⁷ Ante, p. 478.

⁸ *Edwards v. Pool*, 2 Dick. 693.

make a return to that effect, and bring him to the bar of the Court, as directed by the order, when he will be committed to the Queen's Prison; whereupon the Court will of course grant a sequestration, and it seems that the order for the sequestration will be absolute in the first instance.¹

If the Sergeant-at-arms finds the party in prison, he must lodge a detainer against him, and make his return accordingly, when a *habeas corpus cum causis* may be moved for, upon which he will be brought up to the Court, and upon motion, turned over to the Queen's Prison in the same manner as upon the ordinary process of contempt, and upon that being done, a sequestration may be moved for.²

A contempt incurred by the non-production of documents, pursuant to a Master's warrant under a decree or order, can only be cleared in the same manner as other contempts, i. e. by producing the Master's certificate of the party's having deposited the documents required, and moving to discharge the process upon payment of costs.

It is to be observed that, in order to render sequestrations issued under the above circumstances more completely adapted to the object for which they are issued, it is provided by the 1 Will. IV. c. 36, s. 15, Rule 16, "That where a person shall be committed for a contempt in not delivering to any person or persons, or depositing in Court or elsewhere, as by any order may be directed, books, papers, or any other articles or things, any sequestrator or sequestrators appointed under any commission of sequestration, shall have the same power to seize and take such books, papers, writings, or other articles or things, being in the custody or power of the person against whom the sequestration issues, as they would have over his own property; and that, thereupon, such articles or things so seized and taken, shall be dealt with by the Court as shall be just."

The same rule provides, that, after such seizure, it shall be lawful for the Court, upon the application of the prisoner, or of any other person in the cause or matter, or upon any report to be made in pursuance of the Act, to make such order for the discharge of the prisoner, upon such terms, and, if it shall see fit, making any costs in the cause, as to the Court shall seem proper.

¹ Ibid.; see *Lupton v. Hescott*, 1 S. & S. 274.

² Ante, p. 479.

Where the deeds, &c., are brought into the Master's office, they are usually deposited in a secure box, where all parties wishing to inspect them or make extracts therefrom, are permitted to do so on taking out the usual warrants for that purpose.¹ The Master has, however, under the 60th Order of 1828, above referred to,² power to dispense with the deposit of the documents in his office, and to give directions for the inspection of them by the parties requiring the same, at such time and in such manner as he shall deem expedient.

It may be observed, that if a party depositing documents in a Master's office, pursuant to a decree or order, should require the use of them, for the purpose of enabling him to put in his examination, he may obtain an order, upon motion or petition, for the delivery of them to him for the purpose.³

When the purposes of the production of books, &c., are satisfied, an order may be obtained for the re-delivery of them, either by motion or petition.⁴

Examination of Parties.

We have seen before, that, besides the direction that the parties shall produce before the Master all deeds, &c., the decree usually goes on to order "*that the parties shall be examined upon interrogatories, as the Master shall direct.*"⁵ This part of the order is sel-

¹ Bennett, 80.

² Ante, p. 1154.

³ Hand, 137; "it was also ordered, that the plaintiff should have liberty to inspect the documents whilst they were in the custody of the defendant, at all seasonable times, upon his giving reasonable notice; and when the defendant should have put in his examination, it was further ordered, that he should return the said documents to the Master, in the like state and condition as when they were delivered out." Ibid.

⁴ Hand, 155, 156.

⁵ Ante, p. 1154. See *Gilmore v. Gilmore*, 40 Maine, 53; *Hart v. Ten Eyck*, 2 John. Ch. 513; *Hollister v. Barkley*, 11 N. Hamp. 501. By the 105th Rule in New York, it was provided that the Master shall be at liberty to examine any party or creditor, or other person coming in to claim before him, either upon written interrogatories, *viva voce*, or in both modes, as the nature of the case may appear to him to require, — the examination or evidence being taken down at the time by the Master, or by his clerk, in his presence, and preserved, in order that the same may be used by the Court if necessary. In *Remsen v. Remsen*, 2 John. Ch. 499, it is observed by Chancellor Kent, "though the exhibition of interrogatories, duly settled, be the usual mode of examination appearing in the books, I do not apprehend that it is indispensable. The practice with us as I

dom omitted, unless where the reference relates to a fact as to which the examination of the parties would not afford evidence, such as the law of another country, &c.¹ Where, however, it is omitted in the decree or order, the Master has no power to examine the parties,² but, in such case, if the decree has not been enrolled, the Court will order it to be rectified.³

have reason to believe, has been more relaxed, and oral examinations have frequently, if not generally, prevailed. This appears to me to be a question merely of convenience, and does not involve any principle of policy or of right." See 1 Hoff. Ch. Pr. 536; *Story v. Livingston*, 13 Peters, 359. A *viva voce* examination does not alter the rights of the parties, and therefore there can be no cross-examination by the party's own counsel. His answers are testimony, when responsive, and he may accompany them with an explanation fairly responsive to the interrogatory. *Benson v. Le Roy*, 1 Paige, 122.

In the case of *Jackson v. Jackson*, 2 Green Ch. 103, in New Jersey, the Chancellor said: "The practice of oral examination is universal in the State of New Jersey, as well in relation to parties as witnesses, and I believe the practice of cross-examination by counsel is also universal." But it was held, that the cross-examination must be confined to matters or facts which were the subject of inquiry on the original examination, and which were authorized to be examined into by the decretal order.

In Massachusetts, in proceedings in Equity the evidence is taken in the same manner as in suits at Law, unless the Court for special reason otherwise directs. Genl. Sts. c. 131, § 60. And in this State as in all others, where the parties are by law made witnesses in the cause, of course no special order for their examination can be necessary, but they may be examined as other witnesses.

¹ Seton on Decrees, 12.

² Prac. Reg. 199; 2 Ch. Rep. 10. See *McCrackan v. Valentine*, 5 Selden (N. Y.) 42. *Copeland v. Crane*, 9 Pick. 93, was a bill in Equity by the administratrix of a deceased partner, against the surviving partner, for an account, and the bill and the answer of the defendant were referred to a Master, "he to take the books and papers of the partnership, examine the same, receive the evidence, hear the parties, audit and state the accounts, and report the facts material for the decision of the cause"; and the Master examined the defendant on oath, without objection on his part. One of the exceptions taken to the Master's report was, that the defendant was examined upon oath on interrogatories before the Master, he having no special authority by the order of reference thus to examine him. The Court, in their decision overruling this exception, remark, "The order is very general, and does not specify the principles upon which the accounts were to be taken by the Master. But neither party objected to the form of the order, or it would have been drawn up, perhaps, with more precision. But this exception cannot be allowed, because it is not founded on any objection made before the Master. Exceptions are always to be confined to objections disallowed or overruled by the Master. Here we understand the defendant sub-

³ Ante, p. 1041.

The examination of parties under this order is, like the production of documents, in the discretion of the Master, and, in the exercise of this discretion, he may not only refuse to examine a party, but, having examined him, he may re-examine him, *toties quoties*, if he thinks proper, without a new order of the Court.¹

If the Master declines to examine any party when required, (which he usually does by refusing to allow the interrogatories carried in for his examination,) the proper way of taking the opinion of the Court upon the propriety of the Master's decision appears to be, by waiting till he has made his report, and then taking an exception to it, on the ground of his refusal to examine the party.²

Interrogatories may, it seems, be carried in by any party for the examination of another party ; thus, interrogatories may not only be carried in by the plaintiff, for the examination of the defendant, and *vice versa*, but they may be carried in by one defendant for the examination of a co-defendant.³ One executor, however, cannot examine his co-executor to prove that money which he had received, and alleges to have been paid over to his co-executor, had been properly applied by him, as, by such examination, the co-executor would discharge himself also ; in such cases the Court prefers leaving it to the executor who has paid the money over to the other, to discharge himself by his oath, to allowing one party to examine the other.⁴

mitted to an examination, and it is too late to question the authority of the Master." pp. 77, 78. But by the course of practice now existing in Massachusetts, parties may be examined before a Master, as in the other proceedings in the suit, like other witnesses, without any order, and in the same manner as in suits at law. See preceding note. By the United States Equity Rule, 77, the Master has full authority to examine the parties in the cause upon oath, touching all matters contained in the reference.

¹ *Cowslade v. Cornish*, 2 Ves. 270 ; 1 Dick. 149, S. C. By the United States Equity Rule, 81, the Master is at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination must be taken down by the Master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the Court, if necessary.

² *Chennell v. Martin*, 4 Sim. 340 ; also see *Simmons v. Gutteridge*, 13 Ves. 262 ; and post, 1164, 1165.

³ *Simmons v. Gutteridge*, 13 Ves. 265 ; but it seems that a plaintiff cannot examine his co-plaintiff. *Edwards v. Goodwin*, 10 Sim. 123.

⁴ *Dines v. Scott*, 1 T. & R. 358.

These interrogatories are usually, though not necessarily, prepared by counsel; it is not, however, necessary that they should be signed by him, as they must be settled by the Master.¹ As the object of such interrogatories is chiefly to sift the conscience of the party and to obtain admissions from him, they consequently partake more of the nature of the interrogating part of a bill,² than of interrogatories for the examination of witnesses, and are not subject to the same restrictions as to leading questions, &c.

In *Moore v. Langford*,³ however, the V. C. of England appears to have thought that, in a creditor's suit, where the decree is made in the ordinary form, no special interrogatory for the examination of a defendant ought to be allowed, although a case for directing special inquiries is made on the record.

Where the object of the examination is to obtain the admission of the party as to facts detailed in a state of facts, they generally follow the state of facts in the same manner that the interrogating part follows the statements and charges in a bill.

The interrogatories, when prepared and fairly copied, are carried into the Master's office, and the usual warrant "on leaving" is served, upon the return of which, warrants to settle interrogatories must be taken out and served.⁴ Upon the return of the warrant to settle, the Master, in the presence of the parties, peruses the interrogatories, and finally settles them. The Master's clerk then has the interrogatories, as settled, properly engrossed, and the Master signs his name at the foot of the engrossment,⁵ after which a certificate of such allowance must be obtained from the Master and filed in the Report Office.⁶

The proper course for bringing before the Court an objection to the interrogatories as settled by the Master, appears to be, by excepting to the Master's certificate of having allowed the interrogatories, and not by presenting a petition or making a motion to the Court to vary or suppress them.⁷ In *Stanyford v. Tudor*,⁸ however, Lord Thurlow held "that this was not the proper course,

¹ *Purcell v. M'Namara*, 17 Ves. 435; *Jackson v. Jackson*, 2 Green Ch. 102.

² See *McDougald v. Dougherty*, 11 Georgia, 570.

³ 6 Sim. 322; and see *Hopkinson v. Bagster*, 1 Y. & C. 13.

⁴ *Bennett's Prac.* 70.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Chennell v. Martin*, 4 Sim. 343; *Hughes v. Williams*, 6 Ves. 459.

⁸ 2 Dick. 549.

and that the party ought to put in such examination as he thought proper, and that if such examination was not sufficient, it should be referred to a Master who would report his opinion; to which report either side might take exceptions, and then the Court, having the interrogatories before it, would determine whether the examination was sufficient or not." The same opinion is generally considered to have been held by Lord Eldon in *Paxton v. Douglas*; ¹ but it is to be observed, that, if such be the result of his Lordship's determination in that case, it is directly at variance with his former determination in *Hughes v. Williams*; ² upon an attentive perusal of *Paxton v. Douglas*, however, it will be found that the objection to the interrogatories was not on account of their propriety, but of the situation of the party to be examined, which would have rendered him liable, if he answered them, to a pecuniary penalty; his Lordship, therefore, held, that the objection did not properly lie to the question, but to answering it, and that the interrogatories ought, consequently, to be put to the party, leaving it to himself to say whether he would answer them or not. The same observation will, in some measure, though not to the full extent, apply to the case of *Stanyford v. Tudor*; ³ there the objection was, to the irrelevancy of the interrogatories. This, as we have before seen, ⁴ is a ground upon which a defendant may, by answer, decline answering the interrogatories in a bill; and there can be no doubt that, upon a question coming before the Court, involving the consideration whether a party has put in a sufficient answer or not, the Court, in deciding upon it, will take into consideration the relevancy of the interrogatories; still, however, it is submitted that the question whether the interrogatories are pertinent or not, is fairly one which may be brought before the Court by exception to the interrogatories; and that it is strictly the practice of the Court to except to the Master's certificate of allowing interrogatories, can now no longer be matter of doubt, after the decision of the V. C. of England, in *Chennell v. Martin*, ⁵ supported as it is by that of Lord Eldon in *Hughes v. Williams*, ⁶ and by the cases of *The Archbishop of York v. Stapleton*, ⁷ and *Strange v. Thomas*, ⁸ which are both referred to in his Honor's judgment.

¹ 16 Ves. 239.³ 2 Dick. 549.⁵ 4 Sim. 423.² *Ubi supra*.⁴ *Ante*, p. 729 *et seq.*⁶ 6 Ves. 459.⁷ Cited 4 Sim. 345.⁸ Cited *ibid.* 346, and *Seton on Decrees*, 14.

With respect to the form of the exceptions, it is to be observed, that, if one general exception is taken to the certificate, because the Master ought not to have allowed all the interrogatories, the party excepting will succeed if he shows the Master was wrong in allowing one; but if the exception is "because the Master ought not to have allowed any of them," then, if one is proper, the general exception fails as to all.¹

It is to be noticed, that exceptions will lie to the Master's certificate, as well on account of what he strikes out of the interrogatories, as of what he allows in them.² It seems, however, that if the Master disallows the interrogatories altogether, it is not the practice for him to certify his disallowance of them, but he proceeds to make a report without examining the party,³ so that in fact there is, in that case, no certificate of the Master to which exceptions can be taken; the consequence, therefore, is, that the party, dissatisfied with the Master's opinion disallowing interrogatories altogether, must wait till the Master has made his report, and then take exceptions to the report on the ground of his having refused to examine the party.⁴

It has been before stated, that the Master may examine a party *toties quoties* if he thinks proper.⁵ For this purpose the Master is at liberty to receive new interrogatories, wherever he may consider it necessary, to the justice of a case, that he should so do, and this he may do even after a motion for the payment of money into Court, upon an admission in the examination to former interrogatories.⁶ And although several instances occur in the books, in which application has been made to the Court for leave to exhibit fresh interrogatories, it seems that such application is unnecessary, and that fresh interrogatories may be received by the Master, without an order of the Court to warrant them.⁷ In this

¹ Moore v. Langford, 6 Sim. 323; see also Pearson v. Knapp, 1 M. & K. 312, and Cotham v. West, 1 Beavan, 380; Hopkinson v. Bagster, 1 Y. & C. 13; see post, Exceptions to the Master's Report.

² Archbishop of York v. Stapleton, *ubi supra*.

³ Chennell v. Martin, 4 Sim. 342.

⁴ Ibid.; Forbes v. Peacock, 12 Sim. 528; *Ex parte* Charter, 2 Cox, 168; Simmons v. Gutteridge, 13 Ves. 262.

⁵ *Supra*, p. 1162.

⁶ Hatch v. —, 19 Ves. 116.

⁷ Lynn v. Buck, 3 Mad. 281; Price v. Lytton, 5 Mad. 465; Sidden v. Forster, 1 S. & S. 335.

respect, there is a material distinction between the further examination of a party upon interrogatories before the Master, and the further examination of a party as a witness.¹ There seems, also, to be a distinction between exhibiting further interrogatories for the examination of a party as to new facts, after his first examination has been put in and completed, and adding new interrogatories, to those already exhibited, upon the examination to the first having been reported insufficient, in order that both sets of interrogatories may be answered at the same time. In such case, it seems that an order of the Court is necessary, in order to justify the continuance of the process of contempt against the party, till a satisfactory answer has been put in to both sets of interrogatories. Such an order, however, cannot be granted of course as upon the allowance of exceptions to an answer,² but must be made the subject of a special application.³

The party whose examination is required, is bound, after the Master has settled the interrogatories, to prepare his examination forthwith, and if there is any delay on his part, the Master, on a warrant being served, underwritten, "At which time the defendant A. is to bring in his examination to the interrogatories settled by the Master," will fix a day upon being attended by the party or his solicitor, by which such examination is to be brought in.⁴ The time allowed for a party to put in his examination is altogether in the discretion of the Master, but a month is the usual time limited, unless under special circumstances; and the practice sometimes is, when the party or his solicitor attends the warrant, "to bring in his examination," and asks for time, for the solicitor to sign the Master's book, undertaking to bring it in by that time.⁵ The party wishing to obtain further time for putting in his examination, may obtain a month by application to the Court upon motion, or by petition to the Rolls, which must be duly passed and served upon the adverse solicitor.⁶ This application appears to be a matter of course, and does not require notice.⁷

¹ *Purcell v. M'Namara*, 17 Ves. 434.

² *Ante*, p. 418.

³ *Anon.* 3 Atk. 511.

⁴ *Bennett*, 72.

⁵ *Ibid.* 73.

⁶ *Ibid.* It is said, that if when the time fixed by the Master has expired, the party requires further time, he should take out and serve a warrant for further time. 2 *Smith*, 133.

⁷ *Hand*, 138.

If the party neglects to attend the usual warrants, or if, having attended them, the examination is not put in by the time limited by the Master, or by the order of the Court, a certificate of such default must be obtained,¹ and an application made to the Court, by motion, for a *four-day order*, viz., for an order that the party may put in his examination within four days, or in default, that the Sergeant-at-arms may take him into custody. The process upon this order is the same as that before stated upon a like order being obtained for default in the production of deeds.²

It is to be observed that, although an order *nisi* for a Sergeant-at-arms has been made, the party will not be in contempt till it has been made absolute, and that he may, therefore, put in his examination at any time within the four days, and will not be liable to the costs of either the certificate of default, or of the order *nisi*.³ It seems also that even after the order *nisi* has been made absolute, and the warrant is in the hands of the Sergeant-at-arms, the party may tender his examination, and the Master is bound to receive it, provided the process has not been executed.⁴

A party in contempt for not putting in his examination, can only be discharged from his contempt upon the same terms as a party in contempt for not putting in an answer,⁵ i. e., upon putting in his examination, and paying or tendering the costs of his contempt. Upon doing this, he may move to be discharged: and it is to be observed, that he is entitled to be so discharged, upon putting in his examination, and that he cannot be detained till the sufficiency of the examination has been ascertained;⁶ the party exhibiting the interrogatories may, however, if the examination should be reported insufficient, proceed upon the old process, and obtain another order for the Sergeant-at-arms to take the party, without a previous four-days' order.⁷

¹ As to filing this certificate, see ante, p. 1157, n. (1).

² See ante, pp. 1157, 1158.

³ 2 Smith, 133.

⁴ Seton on Decrees, 423.

⁵ Ante, p. 492.

⁶ *Bonus v. Flaek*, 18 Ves. 287.

⁷ *Ibid.* It is, however, laid down by Lord Eldon, that he cannot do so, if he has accepted the costs of the contempt; this was also the rule of the Court with regard to answers, but has been altered with respect to them by the 24th of the Orders of 1828 (see ante, p. 492). The Order, however, merely applies to answers, and it is still doubtful whether the Court will extend the principle of it to examinations.

If the party to be examined is desirous of putting in his examination, he should procure a copy of the interrogatories, as settled by the Master, from the Master's office, and should prepare his examination without delay. For that purpose, if it is necessary that he should have in his possession any documents which he has delivered in to the Master's office, he may, as we have seen, obtain an order for the re-delivery of them to him for the purpose of enabling him to prepare his examination.¹

An examination, though generally drawn or settled by counsel, is not necessarily signed by him,² there being no order of the Court requiring that it should be so, as in the case of a pleading. It is entitled in the cause, and is described in the heading, as "*The answer and examination of the above-named defendant [or plaintiff], A. B., to interrogatories exhibited on behalf of the above-named plaintiff [or defendant], and allowed by , one of the Masters to this Honorable Court, to whom this cause stands referred, pursuant to a decree made on the hearing thereof [or to an order], bearing date the day of 18 .*"

An examination is in the nature of an answer, and not of a deposition, and is governed by nearly the same rules as answers.³ It does not, however, commence with any protestation, but proceeds, at once, to answer the interrogatories *seriatim*, viz., "To the first interrogatory this examinant *saith*," &c., and there is no general traverse at the end.

The examination, when prepared, must be engrossed upon parchment, and sworn to, before a Master who may be either the Master directing the examination, or the Master at the Public Office, in the same way as an answer.

The examination of a peer must be upon oath, as well as that of

¹ Ante, p. 1149. Where a defendant is examined by the plaintiff, in relation to the amount due the plaintiff, on account of certain property sold by the defendant on commission, it is not sufficient for the defendant to refer to his books of account, produced before the Master; but he must give the best answer he can from recollection and information, aided by a recurrence to the books and papers, immediately within his control and possession, accompanied by such explanations responsive to the questions put, as are necessary to prevent improper conclusions being drawn from his answers. *Peck v. Hamlin*, 1 Paige, 247.

² *Bonus v. Flack*, 18 Ves. 287; see also *Yates v. Hardy*, Jac. 223; *Keene v. Price*, 1 S. & S. 98.

³ Ante, p. 736. The answers to interrogatories are put in in writing, on advice of counsel; and under this mode of proceeding there can be no cross-examination. *Jackson v. Jackson*, 2 Green Ch. 102.

a commoner ; the privilege which a peer enjoys of answering upon honor, not extending beyond his answer.¹

If the party to be examined is not in a competent state of mind to put in his examination, the usual course is, for the Court to appoint some person to put in his examination for him ;² but in a case where the plaintiff had filed a bill to be relieved against a security which he was drawn in to execute, by fraud and imposition, without any valuable consideration, and a decree was made for an account, and that all parties should be examined upon interrogatories, — upon its being represented that the plaintiff was a weak man, and easy to be prevailed upon to say or admit anything that was not true, how much soever to his prejudice, the Court directed that, in case the defendant exhibited interrogatories against the plaintiff, the Master should take care to examine the plaintiff in person, and thereby see that no advantage should be taken of his weakness.³

Where the party to be examined lives more than twenty miles from London, or being sick, is unable to attend at the Master's office, for the purpose of swearing to his examination, he may have a commission to take it in the country, or at his own house, for which purpose he must obtain a certificate from the Master, that he considers such a commission necessary.⁴ This certificate is usually granted at the same time, and forms part of the Master's certificate of having allowed the interrogatories.⁵ A party resident in the country is entitled to a commission, although an order *nisi* for a Sergeant-at-arms has been made.⁶

Upon this certificate being filed, an order for a commission may be obtained, as of course, on application to the Court, upon motion or by petition at the Rolls.⁷ The order generally directs, that the party may be at liberty to take out a commission to take his examination to the interrogatories, and that the solicitor for the other party may, in two days after notice of the order, give the solicitor for the party obtaining the order, Commissioners' names,

¹ Meers v. Lord Stourton, 1 P. Wms. 4.

² Page v. Page, 28th Nov. 1799 ; 1 Newl. 325.

³ Piddock v. Brown, 3 P. Wms. 288.

⁴ Bennett, 74.

⁵ Ibid. Appx. 27.

⁶ Anon. 1 Vern. 187.

⁷ Bennett, 74, and Appx. 27, No. 9.

or that in default thereof, the defendant may have such commission directed to his own Commissioners.¹ The time of the return of the commission is not mentioned in the order, but is left to the Master's discretion.²

This order must be served in the usual way, and the Commissioners' names struck in the same manner as upon commissions to take answers. The Commissioners' names being struck, the commission is obtained from the Clerk of Records and Writs, by whom it is sealed in the same manner as a *dedimus*, to take an answer from which it differs little in form, save that a duplicate of the interrogatories must be obtained from the Master's office, and attached to it³ in the same manner that the *tenor* of the bill used formerly to be annexed to the common *dedimus*. It may, however, be remarked, that although a commission to take an answer abroad can only be obtained by motion or petition,⁴ yet it seems that there is no such rule with respect to a commission to take the examination of a party, but that upon the Master's certificate it may be obtained of course.⁵

The manner of proceeding under a commission to take the examination of a party, and of executing and returning it, is in all respects the same, *mutatis mutandis*, as in the case of a commission to take an answer.

The examination, when taken by commission, is returned to the Record and Writ Clerk's Office, in the same manner as a *dedimus* to take an answer, and a copy of it is made by the Clerk of Records and Writs.⁶ When the examination is sworn in London, it is left at the Master's chambers, and a warrant on leaving the same must be taken out and served; in that case the Master's clerk copies the examination for the party exhibiting the interrogatories.⁷

If an examination contains any matter which is scandalous or impertinent, it may be expunged. In order to have this done, under the old practice of the Court, it was necessary, in the first

¹ Bennett, 74, and Appx. 27, No. 9.

² *Hairby v. Emmet*, 5 Ves. 683.

³ Bennett, 75.

⁴ *De Feucheres v. Dawes*, 5 Beav. 144.

⁵ *Bamford v. Bamford*, 2 Hare, 642.

⁶ 2 Smith, 147, 3d ed.

⁷ *Ibid.* 146.

instance, to procure an order to refer it to the Master to examine, and state to the Court whether the examination contained any scandalous or impertinent matter; but by the 73d Order of 1828, it is directed, that "If any party wishes to complain of any matter introduced into any state of facts, affidavit, *or other proceeding* before the Master, on the ground that it is scandalous or impertinent, he shall be at liberty, without any order of reference by the Court, to take out a warrant for the Master to examine such matter; and the Master shall have authority to expunge any such matter as he shall find to be scandalous or impertinent."

In order, therefore, to have matter which is impertinent or scandalous expunged from an examination, the party complaining must take out a warrant, as directed by the above order; but as the order applies to all proceedings before the Master, as well as to examinations, the method of proceeding under it will be made the subject of separate discussion in a subsequent part of the present Section. It is, however, to be mentioned in this place, that it is not a matter of course to refer an examination for impertinence, after any proceeding has been had upon it.¹ A reference for impertinence ought also, as in the case of an answer, to precede a reference for insufficiency.

When an objection is taken to an examination, on the ground of insufficiency, no exceptions are filed, as in the case of answers, but on the return of the warrant "to consider the insufficiency," the party complaining must point out the insufficiency, and, upon hearing the opposite party, the Master decides if such examination is or is not sufficient.² If the Master considers the examination insufficient, he gives a certificate to that effect, particularizing the interrogatory or interrogatories, or part of an interrogatory, which he considers not sufficiently answered.³ If the Master considers the examination sufficient, he must also give a certificate to that effect.⁴ In either case, the proper course to be pursued to obtain the opinion of the Court, upon the Master's judgment, is *by excepting to the certificate*.⁵

¹ Johnston v. Ure, 2 S. & S. 578.

² Bennett, 76.

³ Ibid. He should in his certificate fix a time within which a further examination is to be put in. Case v. Abeel, 1 Paige, 630.

⁴ See Chalk v. Thompson, 4 Sim. 350.

⁵ Ibid.; and see Purcell v. McNamara, 12 Ves. 166; Chennell v. Martin, 4 Sim. 340.

It is to be observed, that where the Master certifies the examination sufficient, an exception in general terms, "for that the Master has certified the examination sufficient, whereas he ought to have reported it insufficient," is regular, and that it is not necessary to state in what respect the examination is insufficient.¹

It seems that, formerly, the Masters, in deciding upon the sufficiency of an examination, did not always consider themselves at liberty to take into consideration the materiality of the discovery required; but this doubt has now been set at rest by the 74th Order of 1828, which directs, "That the Master, in deciding on the sufficiency or insufficiency of any answer or examination, shall take into consideration the relevancy or materiality of the statement or question referred to."

In considering the sufficiency or insufficiency of an examination upon exceptions to the Master's certificate, the Court will look at it, to see whether there is any *substantial* defect; and not with a critical eye, holding insufficient every examination that is not framed with the strict accuracy of special pleading.²

An insufficient examination, like an insufficient answer, is considered as a nullity; when, therefore, the examination is found insufficient, either upon the Master's certificate, or by order of the Court made upon exceptions to it, the same proceedings may be adopted as if no examination had been put in at all;³ therefore, if no four-day order, for a Serjeant-at-arms, has been obtained, it may be moved for upon the production of the Master's certificate, or of the order upon exceptions. If a four-day order has been obtained but has not been made absolute, it may be made absolute, upon the production of the Master's certificate or order, in the same way as it would have been if no examination had been put in.⁴ And so, as we have seen, if the order has been made absolute, and the party has been arrested by the Serjeant-at-arms, and discharged upon putting in a further examination; if such further examination is again reported insufficient, the party carrying in the interrogatories may proceed upon the old process.⁵

From what has been above stated, it will be seen, that the same principles which govern the practice, in the case of insufficient an-

¹ Purcell v. M'Namara, *ubi supra*.

² Per Sir W. Grant, M. R., in Purcell v. M'Namara, 12 Ves. 170.

³ See Jackson v. Jackson, 2 Green Ch. 102; 1 Hoff. Ch. Pr. 529, 533.

⁴ Weston v. Jay, 1 Mad. 527.

⁵ Ante, p. 1167. See Case v. Abeel, 1 Paige, 630.

swers, will govern the practice in that of insufficient examinations;¹ and it seems that this will be extended to cases in which a party so far trifles with the Court as to put in a third insufficient examination, and, that the Court will, upon such occasions, adopt the same practice of ordering the party to stand committed, and to be examined upon interrogatories before the Master, as to the points wherein his examination is reported insufficient, as in the case of a third insufficient answer to a bill.²

It is to be recollected, however, that, except in the case above mentioned of a third insufficient examination, the Master cannot, upon an examination being found insufficient, receive further interrogatories, and compel the party to answer such further interrogatories at the same time that he puts in further examination to the original interrogatories, without an order of the Court, and that such order will not be made by the Court, unless upon special application.³

If the Master certifies the examination of a party to be insufficient, the party examining may move, upon the Master's certificate, for the costs of, and occasioned by, the insufficiency of the examination;⁴ and it is stated, that where a warrant has been taken out to consider the sufficiency of an examination, and the Master is of opinion that it is sufficient, the Master should so certify, in order that the examinant may apply for his costs.⁵

Copies of the examination of a party, upon interrogatories, like copies of all other proceedings before a Master, may be taken by all parties to the cause who are interested in them;⁶ and any party to the suit may avail himself of an admission, in such examination, to charge the party examined.⁷ An examination, however, like an answer, can only be made use of as evidence against the party putting it in, and cannot be read as evidence in favor of, or against any other party.⁸

¹ *Weston v. Jay, ubi supra.* The proceedings upon the Master's certificate, as to the sufficiency of an examination, are substantially the same as upon a report on exceptions to an answer for insufficiency. *Case v. Abeel*, 1 Paige, 630.

² *Bennett*, App. 29, C. III. S. 2, Nos. 11, 12; and see also, p. 776.

³ *Ante*, p. 1166.

⁴ *Hubbard v. Hewlett*, 2 Mad. 469.

⁵ 2 Smith, 148, 3d ed.

⁶ *Ante*, p. 1149; *Dyott v. Anderton*, 3 V. & B. 176.

⁷ 2 Smith, 135.

⁸ *Ibid.*; see also, *Dines v. Scott*, T. & R. 358. If the evidence of a party is required before the Master, in favor of or against another party, he may be examined as a witness, subject to the usual objections.

It is to be observed, that a party examining another, is not bound to make use of the examination before the Master ; if he declines to do so, however, the Master may read it himself.¹ In fact, the examination is taken for the information of the Master, and the Master is at liberty to look at it, whether read by the party examining or not, for the purpose of ascertaining the view taken of the case by the examinant, and of seeing how far his statement is contradicted or borne out by the other evidence before him. Upon the same principle, the Court will allow an examination to be read, upon the hearing of exceptions from the Master's report, although it has not been made use of by the party exhibiting the interrogatories before the Master.²

It may be mentioned here, that where in an examination put in by two co-executors, it was stated, that their receipts had been joint ; but it appeared, by affidavit, that such statement was made through mistake and inadvertence, and that one of the executors had, in fact, received nothing, liberty was given to him to put in a supplemental examination to correct the mistake.³

Previously to the promulgation of the Orders of 1828, the power of the Master to examine parties, upon interrogatories, was strictly confined to parties to the record, but by the 72d of the above Orders, it is directed, "That the Master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may appear to him to require ; the evidence upon such examination being taken down at the time by the Master, or by the Master's clerk in his presence, and preserved in order that the same may be used by the Court if necessary.

With reference to this subject, it is to be recollected, that the service of the warrants of the Master, or of the orders of the Court upon the solicitor, in London, by whom such person appears, whether such solicitor act as principal, or agent, will be good service.⁴

It may here be remarked, that now where a person becomes

¹ Gilbert *v.* Wetherell, 2 S. & S. 259.

² Ibid.

³ Hewes *v.* Hewes, 4 Sim. 1, as to correcting an answer by supplemental answer ; see ante, p. 778.

⁴ Ante, pp. 446, 447.

quasi a party upon a claim of this nature, the method of enforcing his obedience to the order of the Court is the same as the course of proceeding against a party to the record.¹

Evidence.

Where the Court directs an inquiry into a fact, it is in the nature of a new issue joined, and what would be evidence in any other case will be evidence before the Master.²

The parties in the cause are, therefore, at liberty, in an inquiry in the Master's office, to make use of all the proceedings which are of record in the cause, whether they be pleadings, such as bills, answers, &c., or in the nature of evidence, such as the depositions of witnesses, or affidavits which have been made use of or filed on former occasions.³ The pleadings in the cause may be used before the Master, for the same purposes that they can be used for before the Court, viz., as admissions by the party on whose behalf they are filed. They cannot be made use of as evidence for or against any other party; thus, where the answer of one defendant against whom the bill had been dismissed, was permitted by the Master to be read as an affidavit against another defendant, and the Master's report was excepted to on the ground that he had so done, Lord Langdale, M. R., allowed the exception: his Lordship observing, that certainly there is no rule more distinct as to evidence than this, — that it ought not only to be evidence in a matter in issue between the parties, but it ought to be the evidence of a person disinterested and giving it for the purpose of declaring the truth, upon the occasion on which it is adduced; but that the answer is an answer which is put in to a bill, is put in by the defendant for the purpose of maintaining his own interest against that of the plaintiff, not for the purpose of declaring the truth as a disinter-

¹ 15th Order, 1841, ante, p. 1079.

² *Smith v. Althus*, 11 Ves. 564. Where the claims set up by one of the parties against the other, are resisted on the ground of fraud, and that question is presented to the Court, and judicially determined in favor of such claims, and the case is sent to a Master to find the amount due, he is not authorized to re-examine the question of fraud. *Gilmore v. Gilmore*, 40 Maine, 50. See *McCracken v. Valentine*, 5 Selden (N. Y.) 42.

³ See *Gilmore v. Gilmore*, 40 Maine, 53. By the 80th Equity Rule of the United States Courts, all affidavits, depositions, and documents, which have been previously made, read, or used in the Court, upon any proceeding in any cause or matter, may be used before the Master.

ested witness between two other parties who are in contest together.¹

If the admissions already made in the pleadings are insufficient, the parties may also, as we have seen, obtain further admissions from each other by exhibiting interrogatories under the direction of the Master for their examination, the answers to which interrogatories may be read before the Master as evidence against the parties by whom they are given.

The Master may also allow any parties who are competent for that purpose, to admit any given facts to be true, and it is directed by an old Order of the Court, that if, before the Master, either party by his counsel, clerk, or solicitor, admit a matter of fact, the Master shall take a memorandum thereof, in his book of minutes or memorandums, and the party admitting shall, in his presence, subscribe such minutes or memorandums; which subscriptions shall be conclusive to the party, on whose behalf the same was so subscribed, so as the other side shall not be put to any proof of the matter.²

It is to be observed, that the Master ought to take the admissions of such parties only as are competent to make them, and that neither infants nor married women will be bound by admissions to their disadvantage.³

The right to use the proceedings in the cause as evidence before a Master upon a reference before him, must be understood to be subject to the same rules and restrictions as govern the admissibility of similar evidence before the Court; but if the proceeding has really the character of evidence upon the matter directed by the decree to be inquired into, it may be received as evidence before the Master, whether it was made use of at the hearing or not.⁴

¹ *Hoare v. Johnstone*, 2 Keen, 553; *Kemp v. Wade*, ib. 686.

² *Prac. Reg.* 364. The propriety of adhering to this rule is exemplified by what took place in the *East India Company v. Keighley*, 4 Mad. 16, in which case the discussion before the House of Lords was principally upon the point, whether the Master's report that certain admissions were made before him, could be the subject of exception; as to which, see Lord Eldon's judgment, ibid.

³ As to how far infants are bound by the acts of persons acting for them in a suit, see ante, p. 69.

⁴ See *Smith v. Althus*, 11 Ves. 564; for this reason, where the proofs in a cause merely go to charge or discharge a party in a matter of account, when the liability to account is admitted, such proofs are never read or entered as read; see *Law v. Hunter*, 1 Russ. 101; *Walker v. Woodward*, ibid. 109.

It seems, also, that the depositions of witnesses in another cause, between the same parties, may be read before a Master without an order to warrant it,¹ though, as we have seen, such an order is necessary to authorize the reading of such depositions or proceedings before the Court at the hearing.² In *Lubiere v. Genou*,³ however, the Master of the Rolls made an order for the reading of the depositions in a cross cause, on an account before the Master, directed in the original cause; but it is to be observed, that, in that case, a difficulty was suggested, arising from the circumstance that the cross bill had been dismissed.⁴

By the 65th Order of 1828, "All affidavits which have been previously made *and read* in Court upon any proceeding in a cause or matter, may be used before the Master."

It is, however, to be remarked, that, by this Order, it is necessary, to entitle a party to read such affidavits before the Master, that they must have been previously *read in Court*. It is also to be observed, that the answer of one defendant cannot be used before a Master as an affidavit against another defendant.⁵

And here it is necessary to call the practitioner's attention to the fact, that, in strict practice, wherever a reference to a Master is directed by a decree or decretal order, under which it becomes necessary to establish facts by the testimony of living witnesses, such testimony ought to be obtained by examination of the witnesses, and that a Master cannot, in any case, proceed upon an inquiry before him upon affidavit, unless by consent of all parties, as the effect of proceeding upon affidavit is to deprive the other side of the power of cross-examination.⁶ For this reason it is, that the Master cannot, strictly speaking, receive affidavits under a decree in which an infant is concerned.⁷ And where a reference had been made to the Master, under the decree, of a question of legitimacy, and the Master proceeded upon affidavits obtained from America, Sir J. Leach, V. C., on a motion for that purpose, directed the Master not to proceed upon the affidavits, but gave

¹ Anon. 3 Atk. 524.

² Ante, p. 864.

³ 2 Ves. 579.

⁴ As to reading depositions in cross suits, see ante, p. 866.

⁵ *Hoare v. Johnstone*, 2 Keen, 553; ante, p. 1176.

⁶ *Rowley v. Adams*, 1 M. & K. 545; and see *Willan v. Willan*, 19 Ves. 590-593.

⁷ But if the infant's solicitor concurs in the use of affidavits, the infant will be bound; see ante, pp. 71, 72.

the parties liberty, under the circumstances, to apply to the Court, if by death or otherwise it should become impossible to obtain, under a commission, the evidence of the persons who had made the affidavits.¹

It is to be noticed, that, under the 51st of the Orders of 1828, the Master is required at the time appointed for considering the matter of the decree or order, amongst other things, "to point out whether the matter requiring evidence shall be proved by affidavit or by examination of witnesses"; and that in a recent case, where the Master had not at that time decided to admit affidavits, but afterwards admitted them, although they were objected to, it was held, upon exceptions to the Master's report, that, as the Master had omitted to decide, at the time of considering his decree, whether the proofs should be by affidavit or examination, the practice remained as it was before the issuing of the Order, and that the exception must be allowed.²

It is to be observed, that, in the case last referred to, the admission of the affidavits had been expressly objected to by the opposite party. It does not appear, however, that a positive assent to reading affidavits is required; the mere circumstance that a party has allowed affidavits to be used without objecting to them, will be sufficient to prevent his afterwards raising an objection to the Master's report on the ground that the witnesses ought to have been examined upon interrogatories.³

The rule which requires the examination of witnesses upon inquiries before the Master, extends only to decrees or decretal orders,—where the reference is made by motion or petition, in

¹ Tillotson v. Hargrave, 3 Mad. 494.

² Gibbs v. Payne, 4 Sim. 554. From the report of this case, it appears as if the Court considered that the 51st Order empowered the Master, at the time of considering his report, to determine upon the admission of affidavits, even where there was no consent by the other parties. *Sed Quare?*

³ Morgan v. Lewis, 1 Newl. 333. Upon reference to a Master to examine the defendant on interrogatories relative to an alleged contempt, and to take such other proof relative to the contempt as shall be produced before him by either party, the Master is not authorized to receive ex parte affidavits of witnesses, unless he is specially directed by the order of reference to receive such affidavits as proof. And, as a general rule, the Court will not allow ex parte affidavits to be used on such a reference, but will compel the parties to produce and examine the witnesses before the Master, so that they may be cross-examined by the adverse party. Cumming v. Waggoner, 7 Paige, 603.

that stage of the cause in which the Court proceeds upon affidavit, the Master may, it is said, do the same;¹ and so, whenever the matters referred to a Master originate in a summary application, as in petitions in lunacy or bankruptcy, the Master proceeds by affidavit, and the same rule applies to references under petitions authorized by particular statutes where no suits are depending, as in the case of a reference upon a petition under the stat. 52 Geo. III. c. 101, which provides a summary remedy by petition in cases of abuses of trusts created for charitable purposes.²

It is, however, to be observed, that where references are made to a Master upon an interlocutory motion in the cause, for preliminary inquiries, such as inquiries into titles,³ or into the amount of principal or interest due upon mortgage, under 7 Geo. II. c. 20,⁴ or under the General Orders of the 9th of May, 1839, the Master has the same power to examine witnesses as under a decree,⁵ and that he is bound, in such cases, by the 51st Order of 1828, to settle what course he will adopt.⁶

By the 66th Order of 1828, it was ordered, "That where, upon an inquiry before the Master, affidavits are received, then no affidavit in reply shall be read except as to new matter, which may be stated in the affidavits in answer; nor shall any further affidavits be read, unless specially required by the Master."

And by the 67th of the same Orders, "The Master shall not receive further evidence as to any matter depending before him, after issuing his warrant on preparing his report."

All persons who are competent to be examined as witnesses in a cause before the hearing, are competent to give evidence before the Master, upon inquiries directed by the decree, subject, however, to this distinction, that witnesses who have been examined in the cause, cannot be examined before the Master, on behalf of the same party, without an application to the Court for leave to

¹ *Sonnet v. Powell*, Seton on Decrees, 22.

² *Ex parte Greenhouse*, 1 Swan. 60.

³ Ante, p. 1005.

⁴ Ibid. 1006.

⁵ Order V, ante, p. 1007.

⁶ *Woodroffe v. Titterton*, 8 Sim. 238. *Quere*, whether the 51st Order, 1828, gives the Master power to settle whether he shall proceed by examination or by affidavit in all references to him, whether by decrees decretal, or interlocutory order, or order under summary proceeding?

examine them,¹ but as to persons who were not witnesses, they may be examined without such leave,² and that although the same matter was in issue, and might have been, though it was not, proved before the decree.³

So also a witness, who has been examined on behalf of one party, may be examined by the other side, after decree, without an order;⁴ but if he has been cross-examined as to any subject other than that concerning which he was examined in chief, an order will be necessary to enable him to be examined before the Master.⁵

The rule above stated, which requires a previous order of the Court for the examination of a witness before the Master, is founded upon the same reason which requires a special order of the Court to authorize a re-examination of a witness before the hearing,⁶ viz., the danger of perjury which would be incurred by a witness deposing a second time to the same fact, that after having seen where the cause pinches, and how his testimony bore upon it, and the anxiety which the Court therefore feels to prevent improper tampering with witnesses, and inducing them to retract, or contradict, or explain away what they have stated in their former examination upon a second.⁷

For the same reason, also, the Court, although it will generally grant leave for the re-examination before the Master of a witness already examined, will put the party under the terms of having the interrogatories approved and settled by the Master, who, in so doing, will take care that the same witness is not a second time examined to the same facts.⁸ It was said by Sir J. Leach, M. R., in *Rowley v. Adams*,⁹ that an order for the examination before the Master, of a witness, who has been previously examined in the cause, is in general accompanied with a direction, that he shall not be examined to any points with respect to which he has

¹ *Jenkins v. Eldredge*, 3 Story C. C. 308; *Pearson v. Darrington*, 32 Alabama, 227; *Remsen v. Remsen*, 2 John. Ch. 495.

² *Smith v. Althus*, 11 Ves. 564; *Hough v. Williams*, 3 Bro. C. C. 190.

³ *O'Neil v. Hamill*, 1 Hogan, 183.

⁴ *Melford v. Peters*, 8 Sim. 630.

⁵ *England v. Downs*, 6 Beav. 281.

⁶ *Vaughan v. Lloyd*, 1 Cox, 312.

⁷ See ante, p. 970.

⁸ *Vaughan v. Lloyd*, 1 Cox, 312; *Whitaker v. Wright*, 2 Hare, 321.

⁹ 1 M. & K. 545.

been previously examined; but in *Vaughan v. Lloyd*,¹ which has been before referred to, Lord Thurlow refused to insert any such direction in the order, and expressed a doubt whether the order in *Browning v. Barton*,² in which such a direction had been given was proper. His Lordship, in support of his opinion said, "Suppose the witness had been examined in the cause on a mere general interrogatory, under which he might have deposed to the point required, but did not, and a more particular interrogatory was exhibited to get at his testimony, I should think the Master would do right in admitting it. This matter is, therefore, to be judged of by the Master, and, if his judgment is erroneous, you may then come here to have it rectified."³ And this appears to be now the practice of the Court. But though the Master may not be positively restricted, by the Order not to examine the witness as to points upon which he has been before examined, he is nevertheless bound, in settling the interrogatories, to take care that they do not extend to matter embraced in his previous examination,⁴ unless he is expressly directed to examine as to such matters.

And it seems, in general, that the Court will not, by its order, sanction the Master in examining a witness already examined in the cause, as to matters upon which he has been before examined,⁵ unless in cases where the first examination has failed accidentally, and without fraud, by reason of his having been then incompetent, as in *Sandford v. —*,⁶ in which case a witness had given evidence under a release executed by him, which, by mere accident, did not cover a very small debt due to him, in respect

¹ *Ubi supra*.

² 2 Dick, 508; cited 1 Bro. C. C. 388, *sub nomine*, *Browning v. Barker*, S. C.

³ In *Earl v. Pickin*, 1 R. & M. 547, the Lord Chancellor, instead of directing an issue, sent the case to the Master, directing *that the Master should be at liberty to examine witnesses already examined*, and to the same points; but the cause was afterwards brought on upon a motion to vary the minutes, by striking out that direction in the decree, and substituting a direction for an issue. This application was supported on the ground that the direction in the decree as to the examination of witnesses, was a violation of the settled principles and practice of the Court, and would be pregnant with consequences most dangerous to justice, and the Lord Chancellor ultimately ordered that the decree should be varied, by directing an issue.

⁴ *Sandford v. —*, 1 Ves. jr. 398.

⁵ *Earl v. Pickin*, 1 R. & M. 547.

⁶ *Ubi supra*; 3 Bro. C. C. 370, S. C.; 2 Dick. 750, S. C.

of which he was interested at the time of his examination, and was, therefore, then incompetent; and the Court made an order for his re-examination before the Master, upon the same point,¹ *the interrogatories to be settled by the Master.*²

The rule restricting the second examination of witnesses to points upon which they have not previously been examined, was further extended by Sir John Leach, M. R., in *Rowley v. Adams*,³ who allowed a witness, who had been examined in the cause, and had afterwards made an affidavit in support of a state of facts before the Master, to be examined *viva voce* before the Master, upon the subject of his affidavit.

When the reason upon which the rule requiring an order of the Court for the re-examination of a witness before a Master, who has been already examined in the cause, does not exist, the rule need not be observed; thus, when the witness has been examined only to prove exhibits at the hearing, he may be examined on interrogatories before the Master, to prove other exhibits without a special order.⁴

If a witness who has been examined in the cause is afterwards examined, by the same party, before the Master, without an order, the opposite party may obtain an order to suppress the depositions for irregularity;⁵ such order, however, will, if the circumstances justify it, be made without prejudice to any application for the re-examination of the same witness.

In *Greenaway v. Adams*,⁶ where witnesses had been re-examined before the Master without an order, but upon different points from those upon which they were examined before, an order was made, that the Master might receive the depositions in evidence. It is to be observed, however, that the application for the order was made by the direction of the Master, and was not opposed; and that Lord Eldon directed that the fact should be specially stated, that notice of the application had been given, and no objection made.⁷

When leave has been obtained by one side to re-examine before

¹ See also, *Callow v. Mincee*, 2 Vern. 472.

² 1 Ves. 400.

³ 1 M. & K. 543.

⁴ *Courtenay v. Hoskins*, 2 Russ. 253.

⁵ *Smith v. Graham*, 2 Swanst. 264.

⁶ 13 Ves. 360.

⁷ See *Jenkins v. Eldredge*, 3 Story C. C. 309; 1 Hoff. Ch. Pr. 538, c. 19, § 6.

the Master a witness previously examined in the cause, if the other side is desirous of cross-examining him, and has also previously examined the witness, an order from the Court will be necessary to sanction the cross-examination.¹

With respect to the power, which one party to the record has to examine another party as a witness before the Master, it is to be observed, that the admissibility of a party, as a witness, depends upon the same rules and principles as the admissibility of parties to be witnesses before hearing; for information upon this part of the subject, therefore, the reader is referred to a former part of the present work;² it may, however, be noticed, that the rule which has been there stated, that a plaintiff cannot be examined by a defendant without his consent,³ appears to have been departed from, in *Hougham v. Sandys*,⁴ where the Court gave permission to the defendants to examine one of the plaintiffs as a witness, upon the certificate of the Master, that the examination would be necessary for the better prosecuting the inquiries; but it is to be remarked, that the plaintiffs were mere trustees of a sum of money, and had filed the bill to ascertain the rights of the defendants in the same, and that, consequently, there being no doubt about the liability of the plaintiffs to the payment of the money, which was admitted, and the costs of suit being payable out of the fund, the reasons which prevent the examination of a plaintiff, as a witness in ordinary cases, did not, in that case, exist.

In order to authorize the examination of a party, who has not been before examined before a Master under a decree, the same order must be obtained as is necessary to authorize the examination of a party before the hearing.⁵

In *Franklyn v. Colquhoun*,⁶ Lord Eldon said he had always thought, that a motion for one defendant to examine another, was not a motion of course, after a decree; but in *Van v. Corpe*,⁷ Sir J. Leach, M. R., after having conferred with the Registrar, said, it appeared to be the practice of the Court that such an order

¹ *Whitaker v. Wright*, 3 Hare, 413.

² *Ante*, p. 882.

³ *Ibid.*

⁴ 2 S. & S. 221.

⁵ See *Remsen v. Remsen*, 2 John. Ch. 495.

⁶ 16 Ves. 218.

⁷ 3 M. & K. 278.

might be obtained, as of course, after a decree, saving just exceptions; his Honor's decision was afterwards confirmed by the certificates of the Secretaries to the Master of the Rolls, and of the Registrars and Six Clerks, and has since received the sanction of Lord Langdale, M. R., in *Paris v. Hughes*.¹

This rule, however, will not apply where the party has been previously examined as a witness, in which case a special application will be necessary, as in other cases, and the Master will be directed to settle the interrogatories for the purpose of precluding the re-examination of the party to matters as to which he has been before examined.²

The examination of witnesses before a Master is effected, either by exhibiting interrogatories, or by *viva voce* questions, addressed to the witness himself in the Master's presence.³ The former method is the old practice; the latter was introduced by the Orders of 1828.⁴ By the 69th of these Orders, "The Master shall have power, at his discretion, to examine any witness *viva voce*; and in such case, the subpoena for the attendance of the witness shall, upon a note from the Master, be issued at the Subpœna Office; and that the evidence upon such *viva voce* examination shall be taken down by the Master or by the Master's clerk, in his presence, and preserved in the Master's office, in order that the same may be used by the Court, if necessary."⁵

By the 72d of the same Orders, "The Master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require."

When a party wishes to examine a witness before the Master, upon interrogatories, he must have the interrogatories prepared in the same way as interrogatories for the examination of witnesses

¹ 1 Keen, 1.

² 1 Keen, 1; and see *Purcell v. M'Namara*, 17 Ves. 434.

³ See *Story v. Livingston*, 13 Peters, 359; *Remsen v. Remsen*, 2 John. Ch. 501, 502.

⁴ 69th and 72d Orders, 1828.

⁵ See *Herrick v. Belknap et al.*, 27 Vermont, 695. In New Jersey, when, by a decretal order of the Court, any inquiry before a Master is directed to be made in a cause, and the examination of witnesses shall be necessary to obtain the proper information, such examination, if required by either party, shall, at the expense of the party requiring it, be reduced to writing by the Master, in the form of depositions, and returned and filed with the report. Chancery Rule III. § 3.

in the cause.¹ They must be signed by counsel, and when prepared, they must be engrossed upon parchment, and brought into the Master's office; they are not, however, as in the case of interrogatories, for the examination of parties under the directions of the decree, settled by the Master, unless where they are directed to be so settled by the order of the Court, as in the case of witnesses to be examined, who have been before examined in the cause.² If they are directed to be settled by the Master, the Master must sign his allowance of them in the same manner as he signs interrogatories for the examination of parties.³ If they are not to be settled by the Master, he merely marks them as brought into his office.

It seems that the reception of interrogatories for the examination, before the Master, of witnesses who are not parties to the record, or who have not been previously examined in the cause, is not, like the examination of parties, a matter in the discretion of the Master, but that he is bound to receive interrogatories from the parties tendering them, and that the circumstance that the facts, to prove which they are tendered, were in issue, and might have been proved in the cause, is not a sufficient reason for rejecting them.⁴

If the Master refuse to receive interrogatories for the examination of witnesses, the proper course seems to be to apply to the Court, by motion, that he may be directed to receive them.⁵ In *Willan v. Willan*,⁶ however, the Lord Chancellor ordered the application to stand over, at the same time directing that a petition should be presented, stating the particular circumstances, and the dates.

But, although a Master is bound to permit the examination of any witnesses before him, who have not before been examined, it is to be understood that he is only obliged to do so when the examination is proposed to be taken at a proper period of the investigation before him; he cannot receive them after other witnesses have been examined and publication passed, without a special

¹ Ante, p. 908.

² 3 Bro. C. C. 190.

³ 2 Smith, 151.

⁴ *Hough v. Williams*, 2 Smith, 151.

⁵ Ibid.; see, however, *Forbes v. Peacock*, 12 Sim. 535.

⁶ *Cooper*, 291; 19 Ves. 590, S. C.

order of the Court,¹ which will only be made upon surprise,² or under the same circumstances as will induce the Court to make such an order after publication has passed before hearing.³

It may be observed here, that according to the ordinary course of practice, the party intending to examine witnesses ought, previously to bringing in his interrogatories, to carry into the Master's office a state of facts, detailing the circumstances which he intends to prove. This is necessary, in order to enable the opposite party to cross-examine the witnesses, and to know what evidence it will be necessary for him to adduce to support his own case; and it seems that the examination of witnesses taken before such a state of facts has been brought in, would be irregular.⁴ In general, the state of facts should be brought in by the party supporting the affirmative, but this is a rule of convenience, and a state of facts may be brought in tendering a negative issue, upon which it will be competent, to the party bringing it in, to examine witnesses in support of his negative statement.⁵ It seems, however, that, in such a case, the other party can only cross-examine the witnesses; he cannot, regularly, adduce evidence in support of the affirmative proposition, without bringing in a counter-state of facts; but in *Willan v. Willan*,⁶ where he omitted to do so, and the plaintiff (who was the party bringing in the negative state of facts) had examined the defendant upon interrogatories before the Master, putting every question that would bring out complete information as to the nature and extent of his claim, and how he was entitled to have it allowed, &c., and had gone on to the examination of witnesses to support his negative state of facts, and had permitted the defendant to examine his own witnesses to prove the affirmative, without objecting that he had not brought in a counter-state of facts; Lord Eldon held, that the conduct of the plaintiff amounted to a waiver of the objection, arising from there being no state of facts previous to the examination of the defendant's witnesses. The same view was afterwards taken of the practice by the Vice-Chancellor in *Trezevant v. Frazer*.⁷ In

¹ Cooper, 291; 19 Ves. 590, S. C.

² Ibid.

³ Ante, p. 975.

⁴ See *Willan v. Willan*, 19 Ves. 590; Cooper, 291, S. C.

⁵ Cooper, 291; 19 Ves. 590, S. C.

⁶ 19 Ves. 590.

⁷ MSS. V. C. 7th Aug. 1833.

that case, under a decree directing an inquiry into the outstanding estate of an intestate, the plaintiffs carried in a state of facts, charging that certain sums of money had been lent by the intestate to one of the next of kin, who was a defendant in the cause, and were outstanding in his hands, and examined the defendant upon interrogatories, who, in his examination, set up a case, showing that the moneys alleged to be lent had been given to him by the intestate, which he offered to prove by a variety of documents, which he set out; whereupon the plaintiffs amended their examination, by charging that the alleged documents were forgeries, and proceeded to examine witnesses, in support of their state of facts, and the defendant also examined witnesses, without bringing in a counter-state of facts. Upon a petition to suppress the defendant's depositions, on the ground of irregularity, because there had been no counter-state of facts on his part, the Vice-Chancellor held, that the examination of the defendant was a sufficient notice to the plaintiffs of the case intended to be proved by the defendant, and that the plaintiffs had waived their right to object to the defendant's evidence, by their acquiescence in his examination of witnesses.

The depositions of witnesses, examined upon interrogatories under a reference to a Master, may, when the witnesses reside in London, or within twenty miles of it, be taken either by the Examiner or by the Master; where they reside above twenty miles from London, they must be taken by commission. In either case, their attendance, for the purpose of examination, may be compelled by subpœna, which is in the same form as the ordinary *subpœna ad testificandum*, and must be sued out, served, and enforced in the same manner.

In strictness, the examination of witnesses, after a decree, upon interrogatories, ought to be taken by one of the examiners of the Court, who formerly examined all such witnesses as the Master thought necessary, unless the Master certified that a commission was requisite.¹ A practice, however, has grown up, which authorizes the examination of witnesses, upon interrogatories, in the Master's office, by the Master himself. This practice originated with a custom, which appears to have prevailed, of inserting in the decree a direction that the Master should be armed with a

¹ *Parkinson v. Ingram*, 3 Ves. 603.

commission to examine witnesses, and to direct a commission into the country, if he thought fit.¹ How it came that such a direction was inserted in the decrees of this Court, does not appear; but it seems, that it was not of course, though it was always inserted, if desired.² The practice, however, appears to have given rise to differences between the Masters and the Six Clerks, and Examiners of the Court, about the right of taking and keeping such examinations, and to whom the commissions and the depositions thereby taken should be returned, &c., in consequence of which, an Order was made, dated the 27th February, 1667,³ whereby it was directed, that if, upon any reference, the Master should find any particular points or circumstances needful to be proved, to ground his report upon, which were not fully proved, nor could be examined to, before the hearing of the cause, he should then direct the parties to draw interrogatories to such points or circumstances only, and *examine thereupon, in Court, by the Examiners*, if the witnesses shall be or reside within ten miles of London, as by the rules of the Court they ought to do; but that, if further off, and the parties desired it, he might direct a commission into the country, which was to be made out by the Six Clerks, and which said commission and the depositions thereby taken, were to be returned, unopened, to the respective Six Clerks, who ought to have the keeping thereof, and publication was to pass according to the course of the Court in such cases. And it was declared that all other examinations in the Court, for the future, not taken and kept of record by the Six Clerks or Examiner as aforesaid, should from thenceforth be void, and should not be admitted to ground any report, or otherwise made use of in any proceedings in this Court, or at Law.

The above Order, however, does not appear to have been observed,⁴ and we find the practice of examining witnesses, in the Master's office, expressly sanctioned by another Order dated the 23d June, 1687,⁵ which appears to have been promulgated to prevent the Master's clerks from examining the witnesses, and en-

¹ Parkinson *v.* Ingram, 3 Ves. 603; Seton on Decrees, 12.

² Parkinson *v.* Ingram, 3 Ves. 607.

³ Beames's Ord. 218.

⁴ Parkinson *v.* Ingram, *ubi supra*.

⁵ Beames's Ord. 285. This appears to be the Order alluded to in Parkinson *v.* Ingram, 3 Ves. 604, under the description of an Order made the 23d June, 3 & 4 James II.

joining "that every Master himself shall examine all witnesses upon every item of any interrogatory or interrogatories as shall be exhibited before him." It is obvious, from this Order, that it was then the practice of the Master to examine; and in *Parkinson v. Ingram*, before referred to, the Lord Chancellor said, he found, by every person he had talked to on the subject, that it was quite settled that the Master, whenever any subject occurs in which he wishes to have the examination of a witness, takes the examination of the witness, and that there is a subpœna;¹ and the Master of the Rolls, who assisted the Lord Chancellor in that case, stated, that he concurred with him, that the Master, if he thinks fit, may examine a witness after a decree.

It is clear, therefore, that the Master has it in his power to examine the witnesses himself, if he thinks proper to do so, although the practice of inserting such a power in the decree, has been omitted, in this Court, for above a century.² The examination of witnesses upon interrogatories, by the Master himself, appears, however, to be of rare occurrence;³ and when the Master does think it right to adopt this course, he is bound to examine all the witnesses himself, and he must not permit the examination to be taken by his clerk.⁴ He must also examine the witnesses upon every item of every interrogatory that is exhibited before him,⁵ in the same manner as the Examiner; the depositions should also be kept by him, and are not to be made known to the parties till the conclusion, *i. e.* the publication.⁶

When the witnesses are to be examined by the Examiner, the interrogatories having been marked by the Master, are to be filed in the Examiner's Office, and the same course of proceeding will there be pursued, as in the ordinary examination of witnesses before decree.⁷

¹ In *Parkinson v. Ingram*, it is stated that the subpœna for the examination of a witness, before the Master, is the same subpœna as to come before the Examiner, but that it is oddly expressed, being in the same form as a subpœna to answer a bill, but that the label expresses its purpose. A more accurate form of subpœna is now, however, pointed out by the Order of 1845. *Supra*.

² *Sandford v. Biddulph*, 9 Ves. 36.

³ *Handley v. Billings*, 1 Sim. 511.

⁴ *Parkinson v. Ingram*, *ubi supra*.

⁵ Beames's Ord. 285.

⁶ *Willan v. Willan*, 19 Ves. 593.

⁷ *Ante*, p. 916.

If the witnesses, or any of them reside above twenty miles from London, they may be examined by commission.¹ Such commission, however, can only be obtained upon the Master's certificate, that it is necessary;² but it seems that the Master's certificate is all that is requisite to obtain an order for a commission either abroad or in this country;³ and if issued without such certificate, it will be irregular.⁴ It seems that an exception does not lie to this certificate, but that, if it is improperly granted, a motion may be made to discharge the order for the commission.⁵

The order is made, as of course, upon motion, or petition at the Rolls, upon production of the Master's certificate, and the commission is sued out, in the same manner as commissions for the examination of witnesses before decree.⁶

The depositions of the witnesses, when taken by the Examiner, are kept of record in the Examiner's Office; when taken by commission, they are kept of record by the Record and Writ Clerk;⁷ as to the depositions taken before the Masters, in their office, their habit is to keep them there.⁸

It is stated by the certificate of the Six Clerks, mentioned in *Handley v. Billings*,⁹ that where witnesses are examined after a decree by the Examiner, or by commission, an order must be obtained for their publication, unless it is passed by consent and an order was made by the Court upon that statement of the practice. It appears, however, that publication may also pass by warrant, and that, when all the witnesses have been examined, the Master will appoint a day for passing publication, by a warrant taken out and served upon the respective solicitors, and also upon the Examiner, underwritten, to "pass publication of the depositions taken

¹ By the 77th Equity Rule of the United States Courts, the Master may order the examination of witnesses not produced before him to be taken under a commission to be issued upon his certificate from the Clerk's office, or by deposition according to the Acts of Congress.

² *Parkinson v. Ingram*, 3 Ves. 603.

³ *Bamford v. Bamford*, 2 Hare, 642.

⁴ *Bearcroft v. Berkeley*, 2 Cox, 108.

⁵ *Chaffen v. Wills*, 1 Dick. 377; but see *Chennell v. Martin*, 4 Sim. 342; and post, as to exceptions to Master's report.

⁶ Ante, p. 924.

⁷ Beames's Ord. 221.

⁸ *Parkinson v. Ingram*, 3 Ves. 607.

⁹ 1 Sim. 511.

by the Examiner," after which, office copies of the depositions will be delivered out.¹

Some doubt appears to have been entertained whether, in cases where witnesses are examined by the Master himself, any formal publication takes place;² but from the certificate of the Six Clerks, in *Handley v. Billings*,³ above referred to, it appears, that when witnesses are examined by the Master, publication passes by his warrant.

If it should be necessary to enlarge publication, warrants must, before publication has actually passed, be taken out and served upon the adverse solicitor, and also upon the Examiner; and the Master, upon attendance, will exercise his discretion upon hearing all parties interested.⁴

After publication of the depositions, upon a reference to a Master, a new witness cannot be examined without a special order to warrant it,⁵ which will only be granted upon the same grounds as those upon which the further examination of witnesses after publication is permitted before the hearing.⁶

The preceding observations with regard to the examination of witnesses after a decree, refer only to the examination of witnesses upon interrogatories, which, previously to the Orders of 1828, was the only way in which witnesses could be examined in a Court of Equity, unless for the mere purpose of proving exhibits.

We have seen, however, that by the 69th of the above Orders, the Master is now empowered, in his discretion, to examine any witnesses *viva voce*.⁷ It does not appear to have been positively decided, whether the discretion given to the Master, by this Order, is limited by the rules before laid down with regard to the examination of witnesses who have been before examined; but in *Rowley v. Adams*,⁸ where the question arose upon the Master's refusal to

¹ 1 Turn. & V. 396. It may be observed, that the Orders of 1845, with respect to publication, do not seem to apply to examinations before the Master, as no replication is filed, ante, p. 807.

² See *Willan v. Willan*, 19 Ves. 591; and *Sheppard v. Collyer*, cited ib.

³ *Ubi supra*.

⁴ 1 Turn. & V. 396.

⁵ *Willan v. Willan*, 19 Ves. 594; *Winpenny v. Courtney*, 5 Sim. 554. This extends to the examination of a witness *viva voce*, *Trotter v. Trotter*, 5 Sim. 538.

⁶ Ante, p. 956.

⁷ See ante, pp. 1183, 1184.

⁸ 1 M. & K. 543, *supra*.

examine a witness *viva voce*, who had been previously examined in the cause, the Master of the Rolls seems clearly to have recognized the rule, that a witness who has been examined in the cause cannot be re-examined before the Master, without an order, as applying to a *viva voce* examination, as well as to an examination upon interrogatories, and made an order accordingly. And it seems, also that where witnesses have been examined under a decree, and publication has passed, the Master is under similar restrictions as to the examination of witnesses *viva voce*; therefore, where, after publication passed, and a warrant on preparing the report had been taken out and served, the Master conceiving that the discretion given him by the 69th Order, might be exercised at any time, took the examination of a witness *viva voce*, the Court, on motion, suppressed the deposition.¹

In order to compel the attendance of a witness to be examined *viva voce* before the Master, a subpœna may be sued out in the same manner as an ordinary subpœna, upon a note from the Master.² The form of the subpœna is pointed out by the Orders of 1845.³

A party wishing to examine a witness *viva voce*, must take out a warrant for that purpose, underwritten — “To examine A. B. *viva voce*, before the Master,” which must be served upon the solicitor for the opposite party.⁴ If a subpœna is necessary, he must serve one upon the witness, with the usual note fixing the time of his attendance at the return of the warrant; at which time the parties must attend the Master, together with the witness. The party calling the witness examines him, and the other party cross-examines him, and the Master asks such questions as he thinks proper, the questions not being put from written interrogatories.⁵

It may be observed here, that as the examination *viva voce*, takes place openly, before the parties, their counsel, or solicitors,

¹ Trotter v. Trotter, 5 Sim. 338; the objection in this case was upon two grounds; 1st, because the witness had been examined after publication; and 2d, because, under the 67th Order, the Master could not receive any further evidence.

² 69th Order, 1828. The 78th Equity Rule of the United States Courts provides for the authority of the Master to compel the attendance of witnesses and the mode of proceeding by attachment for contempt, in refusing to attend or to testify.

³ See ante, p. 881.

⁴ 2 Smith, 162, 3d ed.

⁵ Ibid.

the evidence given is fully known, at the time, to the parties interested, and therefore no formal publication of it is necessary.

We have seen that, by the 67th of the Orders of 1828,¹ the Master cannot receive further evidence, after issuing the warrant on preparing his report. This Order has been considered to extend to prevent the Master from examining a witness *viva voce*, after issuing the warrant to prepare his report.²

State of Facts.

The attention of the reader has been drawn to the necessity there exists for a party, who intends to examine witnesses before a Master under a decree, to carry in a state of facts, detailing the circumstances which he proposes to prove;³ but as a state of facts is frequently required for other purposes than that of affording a foundation for the examination of witnesses, and is the general form by which the prosecution of every reference to a Master is commenced, it will not be superfluous in this place to devote a few lines to the consideration of its nature, and of the practice arising out of it.

A state of facts, as its name imports, is a statement in writing, made by a party who wishes to prosecute or resist any inquiry before a Master, of the facts and circumstances upon which he relies, either in support of his own cause, or in contradiction or defeasance of that of his adversary. It is, in effect, the "*pleading*" of the party before the Master, and is governed by nearly the same rules and principles as pleadings in the Court, although, not being signed, nor, in general, prepared by counsel, they are not always so strictly observed. A state of facts, however, must be pertinent to the matter, and must not, any more than any other proceeding in the cause, contain any scandal, and if it is either scandalous or impertinent, the scandalous or impertinent matter may be expunged, in the manner which will be presently pointed out.⁴ A state of facts is intituled in the cause, and contains a detail of the facts and circumstances intended to be relied upon by the party: when the party carrying in the state of facts, makes

¹ See ante, p. 1179.

² Trotter v. Trotter, 5 Sim. 383.

³ Ante, p. 1185.

⁴ Whether a Court of Chancery will reject a state of a case, parts of which are printed in italics, is a question for the discretion of the Court. Cooper v. Cooper, 1 Stockt. (N. J.) 655.

any claim upon the fund in Court, it is usual to conclude the statement with the particulars of the claim, in the manner of a prayer for relief to the bill, as follows:—“*And the said A. B., therefore, claims, &c.,*” in such case the proceeding is called “*a state of facts and claims.*” When the object of the party is to charge another with the receipt of money, &c., the state of facts concludes with a charge in the following form:—“*And the said A. B., therefore, charges, &c.,*” in such case the proceeding is called “*a state of facts and charge.*” It may be remarked, that a charge is not always preceded by a state of facts, but if the matter appears from any admissions in any account, or examination or proceeding in the Master's office, and requires no other proof in support of it, it is usual to make “*a charge*” only.¹

When a state of facts is prepared, it is carried in to the Master's office, and a warrant “*on leaving*” must be served upon the other parties, who may then apply for and obtain copies from the Master's clerk, and if they have a counter state of facts to leave, they must proceed in the same manner.

It is usual to add to a state of facts, a sort of petition, that the party may be at liberty to add to, alter, or vary the state of facts, as he may be advised; and it is presumed, that such form was originally considered necessary, to enable the party to amend his state of facts, after it has been delivered in. It is, however, now an unnecessary form, as a state of facts may be amended at any time, or a further state of facts carried in, upon leaving which, a warrant, “*on leaving,*” should be taken out and served, as when an original state of facts is left. In the case of *Earl Nelson v. Lord Bridport*,² Lord Langdale, M. R., had occasion to determine, whether it was regular for a party to take in an amended state of facts, after his opponent had completed his examination of witnesses, but before publication had passed; and he came to the conclusion, that such a proceeding was regular, and accordingly he refused a motion seeking either to suppress the amended state of facts, and the commission issued thereon, or to impose terms upon the party who had adopted such a course.

¹ In Vermont, every charge, discharge, or statement of facts, brought in before a Master, shall be verified by oath as true, either positively, or by information and belief. Equity Rule 41, 11 Vermont, 699.

² 6 Beav. 293.

Of Scandal and Impertinence in the Proceedings.

The reader's attention has been already directed to the necessity for excluding scandal and impertinence from examinations and state of facts before a Master, and the same necessity exists with reference to affidavits, and to all other proceedings in the Master's office.¹

Under the old practice, the Master had no authority to look into any proceeding before him, for the purpose of ascertaining whether it was scandalous or impertinent, without an order of the Court directing him to do so ; and so, if he found that there was scandalous or impertinent matter in the proceeding, he could not proceed to expunge it, unless directed to do so by another order ; but, by the 73d of the Orders of 1828,² it is directed that " if a party wishes to complain of any matter introduced into any state of facts, affidavit, or other proceeding *before the Master*, on the ground that it is scandalous or impertinent, he shall be at liberty, *without any order of reference by the Court*, to take out a warrant for the Master to examine such matter ; and the Master shall have authority to expunge any such matter as he shall find to be scandalous or impertinent."

Under this Order, therefore, it is no longer necessary for a party complaining of scandal or impertinence in a proceeding before a Master, to obtain an order of the Court, directing the Master to look into it, but he may proceed upon it at once, by taking out and serving a warrant to examine into it before the Master. The above Order, however, is somewhat deficient, in not pointing out the course to be adopted, after the Master has acted upon the warrant. The Order, as we have seen, directs that the Master shall " have authority to expunge any such matter as he shall find to be scandalous or impertinent," from which it might be inferred, that the Order authorizes the Master immediately to proceed to the operation of expunging. This, however, cannot have been the intention of the framers of the Order, as such a proceeding would be most unfair towards the party bringing in the state of facts or other proceeding, by depriving him of all opportunity of taking the opinion of the Court upon the propriety of the Master's decision, it being the well-known rule of the Court,

¹ For the nature of scandal and impertinence, see ante, p. 353.

² Ord. 1828.

that, after impertinent matter has been expunged, exceptions to a report of impertinence cannot be taken.¹ It is presumed, therefore, that the object of the 73d Order is merely to do away with the necessity for any order, either to examine into the scandal or impertinence, or for expunging it, and to leave the practice, in other respects, as it existed at the time the 73d Order was promulgated. If this be the case, the course of proceeding properly is for the Master, having been called upon by warrant to look into the state of facts, &c., to ascertain whether there is any impertinent or scandalous matter in it, to make his report to the Court, in the same manner that he did under an order of reference, for the purpose of affording the other side an opportunity of taking the opinion of the Court, by excepting to his report, and then, if he reports that there is scandal or impertinence, and no exceptions are taken, to proceed under another warrant to expunge the scandalous or impertinent matter, in the same manner that he did upon the second Order under the old practice.² And it seems that this is the construction put upon the 73d Order by the V. C. of England, who, in a case,³ where the Master was of opinion, that the matter complained of was not impertinent, directed that a certificate should be issued in order that the question might be brought before the Court.

It is to be observed that, under this practice, care must be taken to file the exceptions to the Master's report, immediately upon the report being filed, or at least before the time arrives for attending the warrant to expunge; because, after the expunging has taken place, there is no longer any matter upon the record as to which the Court can form an opinion.

It is to be remarked, also, that the 38th Order of 1845, which requires exceptions in writing to be taken and signed by counsel, in cases of scandal or impertinence, applies only to pleadings or other matters depending *before the Court*, and not to matters in the Master's office; it is not, therefore, necessary in proceeding upon scandal or impertinence in matter before the Master, to take exceptions in writing. It is presumed, however, that if the Mas-

¹ *Wadman v. Birch*, 3 Swanst. 230, n.; *David v. Williams*, 1 Sim. 17; *Norway v. Rowe*, 1 Mer. 135.

² This is nearly the course of proceeding pointed out by the Orders of 1845, ante, p. 358; but the operation of these Orders is expressly limited to references of answers, or other pleadings or matters depending *before the Court*.

³ *Phipps v. Henderson*, 10 Sim. 634.

ter certifies that there is no scandal or impertinence in the matter before him, and exceptions are taken to his certificate, it is incumbent upon the party excepting to point out, by his exceptions, in what particular parts the matter is scandalous or impertinent, in the same manner as was formerly done in the cases of exceptions to the Master's report upon reference for impertinence in pleadings and other matters before the Court.¹

The 42d Order of 1845,² which enables the Master, in case of a reference for scandal or impertinence, to direct by whom the costs are to be paid, applies only to pleadings or other proceedings *before the Court*; in the case of inquiries as to scandal or impertinence in proceedings in the Master's office, the Master has no power to tax the costs without an order to that effect; it seems, therefore, that after the Master has reported that he has found scandalous or impertinent matter, and has expunged it, the successful party should move for the costs occasioned by the scandal or impertinence.

Inquiries as to Heirs at Law, next of Kin, Creditors, &c.

Having directed the reader's attention to the general nature of the proceedings before the Master, and to the powers with which the Master is invested to enable him to perform the duty imposed upon him by the order of reference, it becomes necessary now to point out the course to be pursued in the Master's office, upon the particular reference before him. The objects, however, for which references to a Master may be made, are so numerous and various, that it would be impossible, in a Treatise of this nature, specifically to detail the course of proceeding which should be adopted in each; all that can be done, therefore, on the present occasion, is, to direct the practitioner to the practice in the Master's office, upon some of the most usual subjects of reference, from which he will be able, by analogy, to guide his steps upon others which are not of such frequent occurrence.

References to the Master upon decrees or decretal orders, are either; 1. To make inquiries; 2. To take accounts and make computations; or, 3. To perform some special ministerial acts directed by the Court.

¹ See *Craven v. Wright*, 2 P. Wms. 181; but see *Mackworth v. Briggs*, 2 Atk. 182.

² Ante, p. 776.

Inquiries by the Master are directed either to persons or to facts, though sometimes they are directed to matters of law; but it is, in general, in those cases only where the law comes in as a matter of fact, as in the case of an inquiry into the law of a foreign country, that the Master is ever directed to inquire into the law, the habit of the Court not being to refer abstract questions of law to the opinion of the Masters. Sometimes, however, questions of law are so mixed up with the fact to be ascertained, that it is not possible to decide upon the one without giving an opinion as to the others. In such case, the Master is bound to give his opinion upon the law, as well as upon the matter of fact referred to him; as in the case of a reference to a Master to inquire whether a good title can be made to land, &c.

The most usual cases in which inquiries as to persons are directed to be made by a Master, are those in which it is necessary to ascertain the heir at law or next of kin of a deceased person. The same sort of inquiry is also frequently directed for the purpose of ascertaining the individuals forming a particular class, such as grandchildren, or cousins of a person deceased, or the persons entitled to a share of prize-money.¹ A similar inquiry is also necessary where it is referred to the Master to take an account of the debts due by a particular individual, such account involving, necessarily, an inquiry who the creditors are, as well as into the amount of their claims.²

It may be noticed, with reference to inquiries of this nature, that in almost every decree by which they are ordered, it forms a part of the usual directions, "That Master shall cause advertisements to be published in the London Gazette, and such other public papers as he shall think fit, for next of kin,³ [or for the creditors of the said A. B.,⁴] to come in and make out their kindred, [or prove the debts,] and that he shall fix a peremptory day for that purpose, in default of which they are to be excluded the benefit of the decree."

¹ *Good v. Blewitt*, 19 Ves. 336.

² The 45th Order of August, 1841, has established it as a general rule, "That every decree for an account of the personal estate of a testator or intestate, shall contain a direction to the Master to inquire and state to the Court what parts (if any) of such personal estate are outstanding or undisposed of, unless the Court shall otherwise direct."

³ *Seton on Decrees*, 72.

⁴ *Ibid.* 51.

Where such a direction occurs, the first proceeding to be taken is to apply to the Master's office for an advertisement for persons claiming to be heir at law, or next of kin, or creditors to come in,¹ which, having been obtained and signed by the Master, is taken to the publisher of the London Gazette for insertion, copies of it having been previously made for insertion in some of the daily morning or evening papers, as the Master shall direct.² Where the individual, whose debts or next of kin are to be inquired into, died in the country, it is usual to have the advertisement inserted in one or more of the provincial papers where he died; and, should he have died in any of the colonies, the Master usually requires evidence of similar advertisements having been inserted in the Colonial Gazette or other newspapers of the place.³

In about a month's time from the insertion of this, a second advertisement is obtained from the Master's office, and inserted in the Gazette and other newspapers as before, which is called a *peremptory* advertisement, limiting the day for the creditors or next of kin, &c., to come in and establish their claims.⁴ In the case of advertisements in the East Indies or colonies the first is always *peremptory*.⁵

This limitation of the day is made in compliance with the usual direction in the decree, which, as we have seen, directs that parties who do not come in and prove their debts, or otherwise establish their claims before it arrives, shall be excluded the benefit of the decree.⁶ It seems, however, that notwithstanding this *peremptory* direction, no objection can be offered to the reception of a charge

¹ If more than one of these inquiries are directed by the decree, separate advertisements are inserted for each.

² Bennett, 49.

³ Bennett, 50.

⁴ Ibid.

⁵ 2 Smith, 121, 3d ed.

⁶ It appears that the direction for exclusions has been extended to legatees; Seton on Decrees, 65. This, however, is incorrect, and in anon. 9 Price, 210, Lord Ch. Baron Richards observed, that the reason why creditors are excluded, unless they should come in within a limited time, is, because they could not be known to the Court or ascertained, unless they should appear, and parties interested were not to be delayed by the *laches* of the creditors. The same observation will apply to next of kin, but not to legatees, unless they constitute a class, to ascertain which it is necessary to have recourse to advertisements, in which case there must be a direction for exclusion.

or claim, by the Master, provided the same is left before the warrant on preparing the report has been issued.¹ And that, afterwards, although such charge cannot be entertained by the Master, the Court will let in creditors, or next of kin, at any time while the fund is in Court.²

And even where the money had been apportioned amongst the creditors (the assets being deficient,) and transferred to Accountant-General, to pay them and the costs of the suit, a creditor, who swore that he was not aware of the decree, was allowed, on motion, to come in and prove his debt, upon payment of the costs of the application, and the expense incident to the same, in recasting the apportionment of the property amongst the creditors.³

In *Gillespie v. Alexander*,⁴ after the creditors, who had proved, had been paid their debts, and the residue had been ordered to be apportioned amongst the legatees, another creditor obtained leave to go in and prove his debt; but in the mean time the fund was apportioned, and out of it some of the legatees received the shares due to them on account of their legacies, and the remainder was carried over to the account of the other legatees, and Lord Eldon held, that the creditor was not entitled to receive the whole of his debt out of the funds of the other legatees remaining in Court, but only such part of it as should bear the same proportion to the whole, as the legacies given to those legatees bore to the whole amount of the legacies given by the will. His Lordship, however, reserved permission to the creditor to apply to the Court, as he might be advised, against such of the legatees as had received payment on account of their respective legacies, and directed that he and the legatees, out of whose funds he was to be paid in part, should be at liberty to apply to the Court, according to their respective rights and interests, with regard to the testator's estate remaining outstanding, as and when the same should be gotten in and received.

It is to be observed, that when a decree directs inquiries as to next of kin, creditors, &c., with directions that the Master shall fix a day, &c., after which all persons will be excluded the benefit of the decree, it is not usual for the Master, in his report, to

¹ 2 Smith, 283, 3d ed.; *Wilder v. Keeler*, 3 Paige, 164.

² *Lashley v. Hogg*, 11 Ves. 602.

³ *Angell v. Haddon*, 1 Mad. 530.

⁴ 3 Russ. 130.

notice any creditors except those who come in under the decree. He merely states the claims which have been proved, taking no notice of the possible claims of others, who, whether entitled or not, did not come in.¹ Where, however, under a decree directing an account of the proceeds of a joint adventure, (pronounced upon a bill filed by one partner on behalf of himself and all the others,) in which an inquiry was directed as to who were concerned with the plaintiff in the adventure, with the usual direction as to advertisements, the Master not only reported those who had come in, but proceeded to state the names of several other persons, who, though they had not come in, were nevertheless considered by him entitled to shares of the fund; Sir W. Grant, M. R., on further directions, decreed an account to be taken, not only of what was due to those who had come in, but of what sums had been paid by the defendant, before the suit was instituted, to the other persons who were reported to be entitled to shares, but who had not come in, and of what remained in the hands of the defendant, beyond what had been so paid him; but Lord Eldon appears to have held that part of the decree to be wrong, and to have considered that, by analogy to the case of creditors, the parties who did not come in, ought to be excluded from the benefit of the decree.

In the above case, Lord Eldon observed, that it was clear, by analogy, that if creditors did not come in, and were excluded from the benefit of the decree, "that would not prevent another bill, having due regard to costs, &c." With reference to this observation, it may be observed, that the rule of the Court is, that the distribution of property, under the decree of the Court, amongst persons found by the Master's report to be entitled, does not conclude the rights of persons who have an equal or paramount title to those amongst whom the distribution has taken place;² such are only precluded from taking the benefit of the decree under which the distribution has been made, and they may, notwithstanding that decree, file another bill against the persons who have taken the property under it, to compel them to refund. Thus, after a distribution of the estate of a deceased person has taken place under a decree in a creditor's suit, a cred-

¹ *Good v. Blewitt*, 19 Ves. 336.

² See *David v. Frowd*, 1 M. & K. 200; *Gillespie v. Alexander*, 3 Russ. 130; *Sawyer v. Birchmore*, 1 Keen, 391.

itor, who has not come in under the decree, may sustain a suit against the creditors in an inferior or in an equal class with himself, to compel them to contribute, out of what they have received under the decree, towards payment of his demand.

So, after a distribution of the property of an intestate amongst the persons who have been found by the Master's report to be the next of kin of the intestate, persons claiming to be next of kin, either in opposition to, or in conjunction with, those amongst whom the distribution has been made, may maintain a suit against them, for the purpose of compelling them to refund what they have received. Such a suit, however, can only, after a distribution, under a decree, be filed against the parties who have partaken of the distribution; it cannot be filed against the executor, or administrator, or other person who has acted under the direction of the Court in distributing the fund,¹ for the Court will not permit a party who has acted in pursuance of its decree in distributing a fund, to be afterwards charged for what he has done pursuant to its directions; therefore, after a distribution of assets has taken place under a decree ascertaining the rights of legatees (in pursuance of which advertisements have been published for all persons interested to come in and prove their claims before the Master,) a bill filed by a legatee against the executor, to render him liable for what has been distributed under the decree, will be dismissed, although it appears that the legatee filing the bill was ignorant of the former decree and proceedings.²

It is to be observed, however, that although a party making a distribution under a decree will be protected in what he has done, and the Court will compel parties claiming a share in the distribution by a new suit, to admit the demand ascertained under its authority in the old suit, to be a just demand to the extent allowed by the Court in the administration of assets, such parties will not be bound by any account of the assets taken under a decree made in a suit instituted by a single creditor, not on behalf of himself and others.³ A creditor, therefore, or a legatee, who is entitled to the assets of a deceased debtor or testator, after payment of the

¹ *Gillespie v. Alexander*, *ubi supra*.

² *Farrell v. Smith*, 2 B. & B. 337; see also, *Pooley v. Ray*, 1 P. Wms. 355; *Brooks v. Reynolds*, 1 Bro. C. C. 183; 2 Dick. 603, S. C.; and *Douglas v. Clay*, 1 Dick. 393; *Kenyon v. Worthington*, 2 Dick. 668.

³ Lord Red. 166, 171.

debts, &c., may, after a decree in a suit, to which he was not a party, file another bill against the personal representative for an account of the assets, and, although in prosecuting the accounts of such suit, such creditor or legatee will be compelled to allow the demands admitted by the Court in the former suit, he will not be bound by any account of the property taken in his absence.¹

This, however, is confined to cases in which the first suit was instituted by a single creditor, for the payment of his own demand alone, and will not be applicable to cases in which the original decree was made in a suit instituted by a creditor, on behalf of himself and others, for a general administration of assets.²

But although the distribution of property, under a decree of the Court, amongst persons found to be entitled, does not conclude the rights of persons who have an equal or paramount title, yet the Court will not assist such persons who, with full notice of the proceedings in the suit wherein the fund was distributed, have neglected to prosecute their claims; and, therefore, where, after a distribution had taken place in a suit, by the next of kin of an intestate, amongst the individuals who had come in under the decree, and established their claim as next of kin, and, after a lapse of two years from the distribution, a second bill was filed by persons claiming also to be next of kin, praying that the others might refund, and it appeared clearly, by the evidence, that the plaintiffs in the second suit knew of the proceedings in the first while they were in progress, but neglected to prosecute their claim under the decree, Lord Langdale, M. R., dismissed the second bill, with costs.³

It is also to be observed, that when a party, who has not come in under a decree, seeks to compel those who have benefited by the distribution which has taken place under the decree to refund, he cannot proceed against one only for the whole amount of his demand, but he must proceed against them all, in order that they may all be compelled to contribute in proportion to what they have received; ⁴ and upon this principle the Court acted in Greig

¹ Lord Red. 166, 171.

² David v. Frowd, 1 M. & K. 200.

³ Sawyer v. Birchmore, 1 Keen, 391, 825.

⁴ David v. Frowd, *ubi supra*.

v. Somerville,¹ and in *Gillespie v. Alexander*,² before referred to,³ where a partial distribution had taken place under the decree, amongst some of the legatees, and there were left in Court certain funds, which were directed to be appropriated to the legatees who had not been paid, and afterwards a creditor obtained permission to go in before the Master, to prove his debt, which he proved accordingly, Lord Eldon was of opinion that the creditor was only entitled to take out of the fund in Court, which had been appropriated to the payment of the unpaid legatees, such a proportion of his debt as the amount of the legacies unpaid bore to the other legacies which had been paid.

A creditor or other claimant desirous of coming in before the Master to prove his debt or to establish his claim, after a report has been made, must present a petition, stating the reason of his not having come in within the time limited by the advertisement, and praying to be at liberty now to establish his claim;⁴ this petition must be supported by the affidavit of the claimant.

Where a person, who claimed to be a creditor, but had omitted to come in under the decree, resided out of the jurisdiction, and petitioned to have his claim referred to the Master, the Court made the order, upon his giving security for the costs.⁵

Contribution to Costs.

It may be mentioned here, that where suits are instituted, by creditors or next of kin or other persons of a class, on behalf of themselves and others of the same class, it is usual for the decree to direct, that persons coming in to prove their debts, or to establish their claims, shall contribute to the expense of the suit. Under a decree of this nature, the plaintiff is bound to claim the contribution from the party coming in, as soon as he has established his right before the Master; if he omits to do so then, he will be considered to have waived it; and, therefore, where a plaintiff's solicitor refused to attend at the Accountant-General's Office, with the Master's report, in order that the other creditors might obtain their debts, unless they would pay him their propor-

¹ 1 R. & M. 338.

² 3 Russ. 130.

³ Ante, p. 1199.

⁴ 2 Smith, 286, 3d ed.

⁵ *Drever v. Maudesley*, 5 Russ. 11.

tion of the extra costs of the suit, Sir J. Leach, V. C., held that, the plaintiff, by failing to pursue the decree, and to call for a contribution, had waived all claim to it, and directed the solicitor to attend the Accountant-General with the report, upon the application of every creditor, on being paid the usual fee of 6s. 8d.¹

It seems that, in practice, the direction for contribution is seldom, if ever, acted upon,² which, as far as relates to creditors, is thus accounted for by Lord Eldon: "As the fund brought into Court, in a creditor's suit, is, in part at least, the fund of all the creditors, and as the taxed costs are paid amongst those who are entitled to it, the plaintiffs and their solicitor receive, in effect, the contribution, to which the form of the suit and of the decree gives them a right, without going through a formal process for that purpose."³

Claims.

A person coming in to claim, under a decree, whether as heir or as next of kin, or creditor, or as an individual belonging to a class, must commence by bringing into the Master's office a state of facts, detailing the particulars of his case and the circumstances under which his claim arises.⁴ This state of facts, in the case of

¹ Shortley v. Selby, 5 Mad. 447. When payments are to be made by the Accountant-General to creditors or others, under a decree for apportioning the fund amongst them, the course is, to present the order and office copy of the report (which is generally taken by the plaintiff's solicitor), to the Accountant-General, who examines the report, to see who are the persons whom the Master has found to be entitled, and what sums he has reported to be owing to each; he then draws checks for the several sums, and writes his initials on the margin of the report, opposite to the sums, to indicate what checks have been drawn. The checks, together with the order and office copy of the report, are then carried to the Registrar, who, seeing the Accountant-General's initials, and having first compared them with the order and report, to ascertain whether they are drawn for the correct amount, puts his initials to the margin of the report, and countersigns the checks; and, unless the checks be thus countersigned, payment of them cannot be obtained. Lechmere v. Brazier, 1 Russ. 72, 76.

² See Bluett v. Jessop, Jac. 243; Lechmere v. Brazier, 1 Russell, 76. Mr. Smith, however, mentions a recent case in the Master's office, where security to the amount of 5s. in the pound on the amount of the debt, was called for, before the creditor's charge was allowed to be proceeded upon. 2 Smith Ch. Pr. 287, 3d ed.

³ Lechmere v. Brazier, 1 Russ. 80.

⁴ Creditors of small sums of 20*l.* or 25*l.* apiece or under, are allowed to join in one charge, but separate affidavits by each creditor, in support of their respective debts, are required. 1 Turn. & V. 365.

a creditor coming in under a decree to prove against his debtor's estate, must be accompanied by an affidavit, from the claimant, that the debt remains due.¹ *Such affidavit, however, is not intended as Evidence to the Master, in proof of the debt, and must not be used by him as such.*² "The meaning of the practice is, that a person shall not come here and claim a debt, without giving that assurance that it is due, which arises from his affidavit, which, also, if the debt is contested, affords a protection against the conclusion from other evidence that it is due, when the contrary may be within the knowledge of the party himself; but where the debt is contested, no attention is to be given to the affidavit."³

It may be mentioned, in this place, that a plaintiff in a creditor's suit will be required to prove his debt before the Master, under the decree;⁴ and where the decree directed an account of the estate of the plaintiff's testator, come to his hands, and of his debts, &c., and that the creditors should come in before the Master and prove their debt, and the Master doubted whether he could admit the plaintiff as a creditor to prove a debt due to himself, Lord Hardwicke directed that the plaintiff should be at liberty to go in before the Master and prove his debt, and that the Master should examine him relating thereto, notwithstanding he was a party.⁵

The state of facts and charge or claim being left, a warrant "on leaving" must be served, followed by the usual warrant "to proceed." If the claim is disputed, it must be investigated before the Master, for which purpose the Master has, as we have seen, the power of examining the claimant, either upon interrogatories or *viva voce*, or in both modes, as the nature of the case may require.⁶

The ordinary practice, however, under decrees for the administration of assets, is to examine creditors upon a general set of interrogatories, as they bring in their respective claims; though a

¹ *Burroughs v. Elton*, 11 Ves. 33; *Fladong v. Winter*, 19 Ves. 199. *Morris v. Mowatt*, 4 Paige, 142.

² *Ibid.*

³ Per Lord Eldon, in *Fladong v. Winter*, *ubi supra*.

⁴ *Seton on Decrees*, 55.

⁵ *Newman v. Norris*, 1 Dick. 259.

⁶ *Ante*, p. 1174. Upon a reference to ascertain the right to surplus moneys upon a mortgage sale, the Master may examine the claimants upon oath, touching their respective claims. *Hulbert v. McKay*, 8 Paige, 652.

particular creditor may be examined on a particular set of interrogatories to meet his case;¹ in either case, it seems that the interrogatories must be settled by the Master.

If it should be found necessary to examine any witness, either for or against the claim, such witness may be examined, either upon interrogatories or by the Master *viva voce*, at his discretion, as before pointed out.

It seems, however, that in supporting charges in the Master's Office, the strict rules of evidence are, by mutual understanding, frequently dispensed with, and that bonds, deeds, notes, and other securities, are almost invariably proved by affidavit, recourse being had to the examination of witnesses in very contested cases only, or where fraud is suspected.²

In the case of *Rundell v. Lord Rivers*,³ a question arose concerning the practice in the Master's Office in the proof of bond debts, under a decree in a creditor's suit, and from a certificate of the Master's delivered to the Lord Chancellor upon that occasion it appears, that it is not the practice that the affidavit of debt should state the consideration for which the bond was given, as in the case of simple contract debts, but it is sufficient if the affidavit state that the deceased was indebted in so much money upon the bond. Moreover, if the bond be not twenty years old, the execution of it must be proved in the regular way, and where a case of suspicion is raised as to the consideration, an inquiry is then made into the validity of the bond.

It may be observed here, that where a person, not a party to the suit, carries in a claim before the Master, under the decree, the party representing the estate out of which the claim is made, has a right to the benefit of any defence which he could have made, if a bill had been filed by the claimant in Equity, or an action had been brought at Law to establish such claim. Therefore, as we have seen, an executor may, in the Master's Office, set up the Statute of Limitations as a bar to a claim by a creditor under the decree, provided such claim was within the operation of the statute before the decree was pronounced.⁴ So also, if it is objected that

¹ 1 Newl. 333; 1 Turn. & V. 366.

² 2 Smith, 301.

³ 1 Ph. 88.

⁴ Ante, p. 667. It seems also, that the statute may be set up in the Master's Office, as well by another creditor or legatee, as by the personal representative. *Ibid.*; *Shewin v. Vanderhost*, 1 R. & M. 347; but *query*, whether it can be set up by the Master? *Ibid.*

a person is not a creditor for a valuable consideration, that question may be entered into in the Master's Office, and afterwards come before the Court upon exceptions.¹

With reference to the effect of the Statute of Limitations, in barring a claim brought in by a creditor under a decree, it may be mentioned that in *Sterndale v. Hankinson*,² it was determined that where a bill is filed, by a creditor, on behalf of himself and all others, every creditor has an inchoate interest in the suit from the moment the bill is filed, and, from that moment, time does not run against him; so that a simple contract creditor, coming in under a decree made in such a suit, was admitted to prove, although there had been a lapse of more than six years between the filing of the bill and the decree. It is to be observed, however, that the case occurred before the recent statute,³ and that the claimant was, moreover, a creditor by simple contract. Since that period, however, the statute 3 & 4 Will. IV. c. 27, s. 40, has been passed, which operates as a positive bar to all actions, suits, or *other proceedings*, for the recovery of any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at Law or in Equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued, &c.; and it has been held that a petition for leave to go in under a decree, to prove a debt before a Master, is a *proceeding* within the meaning of the above section.⁴ The effect of the above alteration in the law, therefore, is to prevent all debts being proved before the Master, under a decree, after the period limited by the above section, in cases where they operate as charges upon land or rents and all legacies, leaving, however, the case of simple contract debts upon the footing on which they stood previous to the statute.

Where the Master is satisfied that the claim is properly made out, he marks the state of facts as "*allowed*," and it will then form an item in his report,⁵ and the opinion of the Court upon the propriety of the Master's determination may be taken by excepting to the report allowing the claim.

¹ Per Lord Hardwicke, in *Peacock v. Monk*, 1 Ves. 127-131.

² 1 Sim. 393.

³ 3 & 4 Will. IV. c. 27.

⁴ *Berrington v. Evans*, 1 Y. & Col. 434, Exch. Rep.

⁵ *Bennett*, 54.

Where the Master has admitted the claim of a creditor, he becomes *quasi* a party to the suit; it is not, however, necessary to bring him before the Court by supplemental bill. Where the Master finds that persons are next of kin who are not parties to the record, the strict practice is, to make them parties, by filing a supplemental bill against them. It seems, however, that this may be dispensed with, where there is already one person on the record who is next of kin, provided the others are willing to attend, as if they were on the record; this, however, cannot be done where the claim on behalf of the next of kin is not raised on the record, and none of the next of kin are *in that character* parties to the suit.¹ A creditor or next of kin, or other claimant, if the Master disallows his claim or he has any other ground for dissatisfaction with his decision, may except to so much of the report as relates to his claim²; and it is to be observed that, in a creditor's suit, if the Master disallows the claim of the plaintiff, and exceptions are taken to the report, the Court will not, pending the exceptions, take the conduct of the cause from the plaintiff.³

It is to be noticed, that the method of objecting to the Master's report upon a claim, by exceptions to the report, applies to those cases only in which the Master has taken the claim into consideration and disallowed it;—where the Master refuses to entertain the claim at all, either from a doubt as to his power to investigate it under the decree, or for any reason, the proper course appears to be, to apply to the Court by motion or petition. Thus, where, under the usual decree for an account on a bill by creditors, the Master refused to proceed upon a claim by the surviving partners of the testator, in respect of the balance of certain dealings between the testator, in his individual capacity, and the partnership firm, from a doubt whether he had the power to examine into such claim under the decree, the Court entertained a motion, to refer it to the Master to take the account.⁴

With respect to the costs of persons coming in to establish their claims under a decree, the general rule is, that next of kin going in before a Master, as such, pay the expenses of so doing,⁵ but

¹ Waite *v.* Semple, 1 S. & S. 219; ante, pp. 209, 210.

² 1 Turner & V. 366; and see Gregg *v.* Taylor, 4 Russ. 279.

³ Jeudwine *v.* Agate, 5 Russ. 283.

⁴ See Paynter *v.* Houston, 3 Mer. 297.

⁵ See Richards *v.* The Morris Canal, &c., Co., 3 Green Ch. 428.

that, if, after having established their claims, they are permitted to mix in the cause as if they had been parties, then, in respect of such proceedings, they may be entitled to their costs.¹ The same rule prevailed as to creditor, except where the fund was insolvent, and therefore wholly devisable among the creditors, in which case they were allowed the costs of proving their debts.²

But now with respect to creditors, this rule has been altered, for by the 47th Order of August, 1841, it is directed, "That a creditor who has come in and established his debt before the Master under a decree or order in a suit, shall be entitled to the costs of so establishing his debt, and the sum to be allowed for such costs shall be fixed by the Master without taxation, at the time the Master allows the debt of such creditors, unless the Master shall think that such costs ought to be taxed in the regular mode, in which case the same shall be so taxed by the Master, or he shall request the Taxing Master in rotation, or the Taxing Master to whom any taxation in the same cause, or matter, may have been previously referred, to assist him in taxing the same, and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established."³

Inquiries as to Legacies and Annuities.

It is to be observed, that the course of proceeding by advertisements to invite persons having claims to come in under a decree, is resorted to in those cases only in which it is unknown who the parties are, who may have such claims, or rather where it is possible that claimants may exist besides those who are already known. When all the persons who can claim are ascertained, or capable of being ascertained, without such a proceeding, it will, of course, be unnecessary to resort to it; therefore, when the Master is ordered to take an account of the legacies or annuities given by a will, no advertisement need be inserted in the Gazette or public papers for such legatees to come in, (unless the legacy is given to persons constituting a class, in which case it may be necessary to ascertain,

¹ Waite *v.* Waite, Mad. & Geld. 110; see also, Watkins *v.* Maule, Jac. 107; Abell *v.* Schreech, 10 Ves. 355, overruling Maxwell *v.* Wettenhall, 2 P. Wms. 27; Orwell *v.* Lord Hinchinbrooke, 10 Ves. 356, n.; and Skeene *v.* Pepper, ib. n.; and see Harvey *v.* Harvey, Mad. & Geld. 91; Richards *v.* The Morris Canal, &c., Co., 3 Green Ch. 428, 431.

² Anon. Rolls, 28th June, 1828, Seton on Dec. 56.

³ See 6th Order, 11th April, 1842; and 12th Order, Oct. 1842.

by advertising, who are the parties constituting that class,) because the legacies or annuities will appear by the will. A list of the legacies or annuities, in the form of a state of facts of legacies, &c., and a copy of the will, is generally required by the Master, upon which the usual warrant "on leaving," "to proceed," must be obtained and served.¹ If any of the legatees have been paid, it is necessary that their receipts, and the legacy-duty receipts for each legacy, should be produced, to authorize the Master to report that such have been paid; and the same observation will apply to annuities.²

Inquiries as to Facts.

The cases in which the Master may be directed to make inquiries into facts are so numerous and various in their nature, that it is impossible to point out the rules by which each inquiry is to be pursued in the Master's Office. All that can be done, on the present occasion, is to remind the practitioner of what has been before stated, viz., that the state of facts ought to be brought in by the party supporting the affirmative,³ though as we have seen, a negative state of facts has been permitted.⁴ Where another party affirms the fact to be different from the fact as alleged by the party carrying in the state of facts, the party so affirming must bring in a counter state of facts. A counter state of facts, however, is not necessary where one party merely negatives the facts as alleged by the other.

Inquiries as to Titles.

It has been already stated, that the habit of the Court is, not to refer abstract questions of Law to a Master, and that, except in cases where the matter of Law comes in question as matter of fact, as in the case of inquiries into the Law of foreign countries, that a reference as to the Law of a case is ever made. Still, however, there are many cases in which questions of Law are so strongly involved in the facts into which the Master is directed to inquire, that the Master cannot report upon the fact without also expressing an opinion upon the Law as it affects the matter before him. The most ordinary instance of this occurs where a reference is made to a Master to inquire into the title of a party to property in question in the cause.⁵

¹ Bennett, 50.

² Ibid.

³ Ante, p. 1184.

⁴ Ibid. 1186.

⁵ See *Woodson v. Smith*, 1 Head (Tenn.) 276.

References of this nature are principally made in suits for the specific performance of contracts or agreements for the sale or purchase of estates;¹ and, as they are in the nature of a preliminary inquiry, they may be made either by decree or by order upon motion.² Inquiries into titles are, however, not confined to suits for specific performance, but may occur incidentally in suits having other objects; as, where a bill is filed, by creditors or persons claiming under trusts, to have trust estates sold, and a sale having taken place under the decree, the purchaser procures an order to refer it to the Master to inquire into the vendor's title.³

When an inquiry is directed as to a title, it is not necessary to carry in a state of facts, but the Master proceeds upon the abstract.⁴ If a decree or order has been obtained by the vendor, he must take his abstract to the Master's Office, at the same time that he leaves the order or decree. If the decree or order has been obtained by the vendee, and an abstract has been already delivered, he must, in like manner, carry the abstract so delivered into the office. If no abstract has been delivered, an application may, if necessary, be made to the Court by motion, that the vendor's solicitor may deliver an abstract of the title to the vendee's solicitor.⁵ When the abstract is left in the Master's Office, the usual warrant "on leaving," and afterwards "to proceed," must be taken out, and served.⁶

When the abstract is brought in, the solicitor of the vendee should carefully compare the abstract with the title-deeds, for which purpose, if necessary, the production of such of them as are in the custody or power of the vendee, or of any other parties to the cause, may be compelled, in the manner already pointed

¹ *Frost v. Brunson*, 6 Yerger, 36; *M'Comb v. Wright*, 4 John. Ch. 319. See *Jackson v. Ligan*, 3 Leigh, 161; *Enraght v. Fitzgerald*, 1 Con. & Law. 181. But if it manifestly appears from the bill and answer, that no title can be made, the reference will not be ordered. *Frost v. Brunson*, 6 Yerger, 36. If the Master reports in favor of the title, a reference is made to him to approve of the conveyance. *Ib.*

² *Ibid.* 1196. See *Winterbottom v. Ingham*, 9 Sim. 654.

³ See post, "Sales of Estates."

⁴ *Bennett*, 153.

⁵ 1 Turn. & V. 417.

⁶ *Ibid.* It is to be recollected that in cases of sales under the decree of the Court, the Master will only allow the vendor's solicitor to attend before him, upon the investigation of the title. *Ante*, p. 1149.

out.¹ The Master, however, always proceeds upon the abstract only, upon which alone he makes his determination, unless the vendee insists upon the production of the title-deeds, the Master, as well as the Court, always taking it for granted that, whenever the vendee omits to call for the production of the title-deeds, he is satisfied that the abstract is correct. Upon this ground, an exception to a Master's report upon a title to copyholds, because no surrender had been produced before him, was overruled.²

On litigated questions of title, written objections to the abstract are brought into the Master's Office by the party objecting, and the Master is either attended by counsel on both sides, or the written opinions of counsel upon the abstract, already given, are produced to him, according to circumstances.³

In cases of difficulty, the Master seldom takes upon himself to decide intricate questions of title. He usually directs the abstract to be laid before a conveyancer, upon whose opinion he exercises his own judgment in reporting to the Court. In such cases, the original abstract, with instructions, in writing, by the Master's clerk, "to advise on the title, by the direction of the Master," with a copy of the order of reference, and the objections taken by the purchaser, with the vendor's answers thereto, are taken by the solicitor, and laid before a conveyancer, and when he has given his opinion thereon, the abstract must be returned to the Master's Office, by the solicitor who left it.⁴

It may be mentioned in this place, that the right of the Master to send the abstract of a title before him, to a practising conveyancer, was questioned before Lord Eldon, in *Flower v. Walker*,⁵ and appears to have received his Lordship's sanction.

In the prosecution of the order for reference, the Master, in his discretion, may examine the parties upon interrogatories,⁶ receive

¹ Ante, p. 1153. The seller is bound to produce the title-deeds mentioned in the abstract, in order that the abstract may be examined with them, although they are not in his possession, and the purchaser is not entitled to the custody of them. But if they are in the possession of a third person, the purchaser's solicitor, it seems, must send to the place where the deeds are, in order to examine them with the abstract, and the seller must pay the expense of the journey. 1 Sugden V. & P. 449.

² *Poole v. Shergold*, 1 Cox, 160.

³ Bennett, 154.

⁴ 1 Turn. & V. 418.

⁵ 1 Russ. 408.

⁶ See ante, p. 1161.

evidence upon affidavit, or by the examination of witnesses before him, either upon written interrogatories or *viva voce*.¹ He may also call for such deeds and other muniments as are necessary to the elucidation of the title.

If the Master is satisfied with the title, as shown by the vendor, he reports accordingly. If he is not satisfied with the title, he must state the points in which the title is defective.² And it is to be observed that the mere circumstance that since the contract, a suit has been instituted by other parties, and is pending, in which part of the lands are claimed adversely to the vendor, is not a sufficient ground for reporting against a title.³

Where the title is clear, but there are terms, or incumbrances, to be got in, the Master should report in favor of the title.⁴ Before he does so, however, he ought to be satisfied that the terms, or incumbrances, can be got in. If he is not satisfied upon this point, he should report that a good title cannot be made, unless the terms, &c., can be got in.

In *Esdaile v. Stephenson*,⁵ where it appeared that the estate was subject to a rent charge, and a term to secure it, and the purchaser's counsel, before the Master, required the seller to produce a release of it, or evidence that the jointress would release, which, however, was not done, and the Master reported that the seller could make a good title, upon the jointress releasing. Upon exceptions to the report, the Vice-Chancellor consulted the Lord-Chancellor, and stated their joint opinion to be, that the report was wrong. *It should have been*, "*that the seller could not make a good title, unless the jointress joined*"; and the Vice-Chancellor recommended, in future, the form of such report to be, that the seller could *not* make a good title, because A. is a jointress, and no sufficient evidence has been produced to show that she will release.

It may be observed here, that a purchaser cannot, upon a report of a defective title, insist upon being discharged, if the title is capable of being made good within a reasonable time; therefore, when it appears, by the report, that the vendor, on getting in a

¹ Ante, p. 1161.

² *Green v. Monks*, 2 Moll. 325. For information as to what may be considered as good title, see 1 Sugd. V. & P. 329.

³ *Obaldeston v. Askew*, 1 Russ. 219.

⁴ *Bennett*, 152.

⁵ *Mad. & Geld*. 366; *Sugden V. & P.* 219.

term, or getting in administration, &c., will have a title, the Court will not discharge the purchaser, but will put the vendor upon terms to complete his title speedily.¹ It will not, however, do so when it appears that the vendee will have a long time to wait ; and in *Whittaker v. Whittaker*,² where Sir Robert Mackreth wished very much to be discharged from his purchase, Lord Kenyon would not hold that the vendor was to be bound during the six years, while all Mr. Wilkinson's affairs were winding up.³

If the Master reports in favor of a title, and any new fact afterwards appears, by which the title is affected, the Court will refer the title back to the Master, upon application by motion, even after the Master's report has been confirmed.⁴ So, if the Master reports in favor of a title, but, upon hearing exceptions, the Court thinks the evidence not sufficient to support the Master's finding, it will, upon application of the vendor, refer it back to the Master, to review his report, in order to give the vendor an opportunity of producing further evidence.⁵ And even after the exceptions have been heard, and the Master's report has been overruled, yet, the seller may, upon an early application, obtain a reference back, in order to show that the title is valid, upon another ground, not before taken ;⁶ and, in general, — where the Master has, by expressing an opinion in favor of the title, prevented the vendor from showing, that if his opinion had been otherwise, still the title was good, — the course of the Court appears to be, to send it back to the Master to review his report, the party moving paying the costs of the motion.⁷

So, where it appears, at the hearing of exceptions to a report, against a title, that the seller can clear up the objections, the Court has sometimes sent the title back to the Master, to review his report ;⁸ and it has frequently occurred, even at the hearing

¹ *Coffin v. Cooper*, 14 Ves. 205 ; but see *Lechmere v. Brazier*, 2 J. & V. 289, in which Lord Eldon said, he would not extend the rule, which the Court had adopted, of compelling a purchaser to take the estate where a title is not made till after the contract, to any case to which it had not already been applied.

² 4 Bro. C. C. 31 ; see 10 Ves. 599.

³ Per Lord Eldon, in *Coffin v. Cooper*, *ubi supra*.

⁴ *Jeudwine v. Alcock*, 1 Mad. 597.

⁵ *Andrew v. Andrew*, 3 Sim. 390.

⁶ *Egerton v. Jones*, 1 R. & M. 694 ; *Portman v. Mill*, *ib.* 697.

⁷ 1 Sugden V. & P. 219.

⁸ *Ibid.*

of the exceptions to the Master's report, that, if the vendor can satisfy the Court that he can make a good title by clearing up the objections reported by the Master, the Court will make a decree in his favor, without a reference back.¹ Thus, where the Master reported that a good title could be made, except as to so much of the estate as a widow was entitled to in respect of her dower, she refusing to join in the conveyance to a purchaser, the Vice-Chancellor said, that if, at the hearing on further directions, the vendor should be prepared to cure the objection which was reported by the Master, he would be in time to do so; but he required an affidavit that the widow was ready to release.²

In *Esdaile v. Stephenson*,³ however, which has been before referred to, the Lord-Chancellor and Vice-Chancellor agreed, that if a title upon a new fact can be made between the report and the further directions, the Court will enforce the contract, as if, in the above case, the jointress had agreed to join when the cause came on for further directions. In such a case, the Court will expect counsel to appear, and consent that she would concur.⁴

It is to be observed, however, that, in the above case, it was expressly laid down, that the Court would not allow a seller to lie by, before the Master, and then, upon further directions, attempt to make a title.⁵

If exceptions are taken to the report, "that a good title can be made," and are overruled, other objections to the title cannot be made; but if exceptions are allowed, and a new abstract of title is delivered, further objections may, of course, be brought in.⁶ Thus, in a case where the seller of a leasehold estate produced the leasehold title, which the Master thought sufficient, and reported accordingly, but the Court held that the lessor's title ought to have been produced, and sent it back to the Master, to review his report; the seller having liberty given him to produce the freehold title, it was considered that the purchaser was at liberty to

¹ Ante, p. 1005.

² *Paton v. Rogers*, Mad. & Gel. 256.

³ Mad. & Gel. 366.

⁴ *Sugden V. & P.* 220. "This points out the necessity, in such cases, of setting down the cause upon further directions, at the same time with the exceptions. In *Esdaile v. Stephenson*, as the exceptions only were before the Court, they were ordered to stand over with liberty to set down the cause for further directions, and then the exceptions and further directions to come on together. Ibid.

⁵ *Sugden V. & P.* 20.

⁶ *Brooke v. —*, 4 Mad. 212.

enter into objections to the leasehold title, which were not taken upon the former discussions before the Master, and upon the objections being afterwards taken, the bill was dismissed.¹

It has been before stated,² that the Court has adopted the practice, at the same time that it refers it to the Master to inquire into the vendor's title, to direct him, in case he shall be of opinion that a good title can be made, to inquire, and state to the Court, when it was first shown that it could be made. With reference to this part of the inquiry, it is necessary to observe that, although in *Lord Braybrooke v. Inskip*,³ Lord Eldon stated, that — “as to the question when the abstract was complete, the abstract is complete whenever it appears, that, upon certain acts done, the legal and equitable estates will be in the purchaser; that may be long before the title can be completed”; — this must be understood to apply only to cases in which the title is outstanding, in persons who are trustees for the vendor, or whom the vendor has any means of compelling to concur; but when it is necessary, in order to make the title complete, that a person, over whom the vendor has no control, should join in the conveyance, such a title will not be considered complete, unless it can be shown that the party has actually conveyed. Thus, when in order to complete a title, it was requisite that a recovery should be suffered by a person who was not a trustee for the vendor, or one whom he had any legal right to call upon to execute it, and the recovery was not actually completed, till a few days after the filing of a bill for specific performance, although the deed making the tenant to the *præcipe*, and the warrant for suffering the recovery, were executed before, it was held that a good title was not shown before the commencement of the suit.⁴

It may be observed also, that when the abstract shows the legal estate to be outstanding, and that the persons in whom it is vested would necessarily be trustees for the vendor, it will not be a complete abstract, unless it shows who the persons are in whom the legal estate is vested.⁵

¹ *Fildes v. Hooker*, 1 Sugden V. & P. 219, n.; 2 Mer. 424, S. C.; 3 Mad. 193, S. C.

² Ante, p. 1005.

³ 8 Ves. 436 See Sumner's ed. 437, notes.

⁴ *Lewin v. Guest*, 1 Russ. 325.

⁵ *Wynne v. Griffith*, 1 Russ. 283.

*Method of Taking Accounts.*¹

According to the practice of the Court, as it existed previously to the Orders of 1828, the usual course of proceeding under decrees to take accounts in the Master's Office, was for the plaintiff, in the first instance, (where it was necessary,) to examine the accounting party upon interrogatories, and then, from the defendant's examination, and from his answer, and the schedules, thereto, or from the other evidence or papers in the cause, to prepare a charge against him, *i. e.*, a statement of the several items which the plaintiff claimed to be entitled, upon proof, to charge the defendant in the account.² This charge was left with the Master, and the different items in it were investigated in the Master's Office. When the charge was gone through, the defendant brought in his discharge, containing a statement of payments and disbursements made by him, and other matters, by which he claimed to discharge himself from the debt attempted to be made out against him by the charge.³ The Orders of 1828, however, simplified the practice, for by the 61st of them it is directed, "That all parties accounting before the Master, shall bring in their accounts in the form of debtor and creditor, and any of the other parties who shall not be satisfied with the accounts so

¹ Orders of reference to a Master should specify the principles on which the accounts are to be taken, or the inquiry to proceed, so far as the Court shall have decided thereon, and the examination before the Master should be limited to such matters within the order as the principles of the decree or order may render necessary. *Remsen v. Remsen*, 2 John. Ch. 495; *Kay v. Fowler*, 7 Monroe, 593.

² 1 Newl. 329.

³ *Ibid.* See *Crone v. O'Dell*, 2 Hogan, 144. The Master ought, in the first instance, to ascertain from the parties, or their counsel, by suitable acknowledgments, what matters or items are agreed to or admitted; and then as a general rule, and for the sake of precision, the disputed items claimed by either party ought to be reduced to writing by the parties, respectively, by way of charges and discharges, and the requisite proofs ought then to be taken on written interrogatories prepared by the parties, and approved by the Master, or by *viva voce* examination, as the parties shall deem most expedient, or the Master shall think proper to direct, in the given case. The testimony may be taken in the presence of the parties or their counsel, except when by a special order of the Court it is to be taken secretly; and it ought to be reduced to writing, in cases where the Master shall deem it advisable, by him, or under his direction, as well where a party as where a witness is examined. *Remsen v. Remsen*, 2 John. Ch. 501, 502. See *Story v. Livingston*, 13 Peters, 359; *Kirkman v. Vanlier*, 7 Alabama, 217.

brought in, shall be at liberty to examine the accounting party upon interrogatories, as the Master shall direct.”¹

The effect of this Order is to render it unnecessary to proceed, in the first instance, by examining the accounting party upon interrogatories.

The account is generally annexed by way of schedule to an affidavit verifying its contents, and if the party does not bring it in within a time to be fixed by the Master, he may be proceeded against, in the same manner as a party not putting in his examination.²

The 62d Order goes on to direct “that all such accounts, when passed, and settled by the Master, shall be entered in a book to be kept for that purpose, in the Master’s Office, as is now the practice with respect to Receiver’s accounts, and with proper indexes, in order to be referred to as occasion may require.”

It has been held, that when accounts entered into this book, as prescribed by the above Orders, are afterwards copied into schedules, annexed to the Master’s report, such schedules are only to be charged at the rate of 6*d.* per folio, like Receiver’s accounts.³

On the account being left, the usual warrant on leaving, &c.,

¹ This Order is adopted in the 79th Equity Rule of the United States Courts. So in the 41st Equity Rule in Vermont, 11 Vermont, 699. See *Hollister v. Barkley*, 11 N. Hamp. 506. In the above case of *Hollister v. Barkley*, 11 N. Hamp. 506, after stating that there are two modes of practice in taking accounts before a Master, one in the form of debtor and creditor account, brought in by the accounting party, the other by examining such party upon interrogatories; and that these two modes are sometimes combined in taking accounts, the Court add, “As we have adopted no rule in this respect, either of these modes may be resorted to; but the better practice probably is, to require the parties to bring in debtor and creditor accounts, and to examine them on written interrogatories, the Master taking down the answers.” See *Reed v. Jones*, 8 Wis. 421. The parties should not put in their general books of account. *Reed v. Jones*, *supra*; *Turner v. Hughes*, 1 Busbee Eq. (N. C.) 116. And it is not good cause of exception to a Master’s report, that he admitted as evidence summary statements of partnership accounts between the parties, as prepared from the partnership books by a person who made them up as the agent of the parties, and in their presence, at the time of the dissolution of the firm. *Turner v. Hughes*, *supra*.

² Ante, p. 1167. Where a party is required to bring in his account before the Master, under the above rule, he must bring in his whole account and for the whole period for which he is accountable. It must also be verified by the usual affidavit, that the account, including both debts and credits, is correct; and that the party accounting does not know of any error or omission therein, to the prejudice of any of the other parties. *Story v. Brown*, 4 Paige, 112.

³ *Attorney-General v. Lubbock*, 1 M. & C. 264.

must be served, and if, upon taking a copy of the account, the party calling for the account is not satisfied with it, he may exhibit interrogatories for the examination of the accounting party, under the direction of the Master.

The account having been taken in, and the party, if necessary, examined, a charge must then be carried in by the party conducting the inquiry.¹ This charge² is usually a transcript of so much of the debtor and creditor account as sets forth the receipts, to which may be added any additional items with which it is intended to charge the accounting party.

It is to be observed here, that although the 61st Order directs the parties accounting before a Master, to bring in their accounts in the manner there prescribed, it is not always necessary to call upon them to do so. If sufficient appears from the admissions of the party to be charged, either in his answer or the schedule to it, or in any proceeding in the cause, to enable the account against him to be properly made out, the party conducting the proceeding may immediately bring in his charge, without calling for any account under the 61st Order.

The charge being left, warrants "*on leaving*" and "*to proceed on the charge*" are taken out, and served on the solicitors of all persons interested in the account.³ On the return of the warrant, the charge is compared with the debtor and creditor account, or with the answer or examination, or the schedules annexed to them, put in by the accounting party, and if the charge is found to accord with them, it is allowed without further evidence. If the charge includes sums not admitted in the account to have been received, they must be substantiated, either by evidence or by admissions in the examination of the party charged, or in his answer, or the schedules thereto.⁴ The charge being established, is marked by the Master "*allowed.*"⁵

It may be mentioned here, that a party conducting an account before the Master is not limited to one charge. If, after his charge is allowed, he discovers other items, with which the accounting party is chargeable, he may either amend his charge, or carry in a further charge, and this he may do as often as may be neces-

¹ 2 Smith, 115.

² As to the nature of a charge, see ante, p. 1193.

³ See ante, p. 1149.

⁴ See 2 Smith, 116.

⁵ Bennett, 84.

sary.¹ In *Napier v. Staples*,² in Ireland, under a decree for an account, the plaintiff had examined the defendant on three successive sets of interrogatories, and had filed a charge, which he amended three times, and had then sued out a commission and examined witnesses. He afterwards filed a further charge, and after various delays, applied to the Master of the Rolls for liberty to file a sixth, which was refused; but upon appeal, the Lord Chancellor, Sir A. Hart, gave him leave to file it, observing:—“I am not aware that there exists any rule, such as has been assumed, that in taking the account, a uniform series of proceeding is to be followed,—a charge, discharge, and examination, and the subject is then dropped.” . . . “It is not the course in England, to comprise everything in the first charge; on the contrary, in the majority of cases, the plaintiff, after he has brought in his charge, looks to the examination of the defendant to furnish him with further items; the Court always taking care, and this is the true principle, to indemnify the opposite party, and to guard against vexatious irregularity, by making the party pay all the costs incurred through his irregularity or delay.” His Lordship afterwards said:—“I do not lay any stress upon the point, whether the plaintiff knew of the existence of this item or not; I think that is not material. Equity would not deserve the name, if it acted on a form to shut out a just claimant, because he came late, whether his doing so was optional or involuntary. But the same equal justice that admits the plaintiff's further charge, gives the defendant a further opportunity to discharge himself, and the order must be so. The defendant must have an opportunity of explaining his case, by evidence, and his denial of the receipt of this sum, by affidavit, will have very great weight in determining it.”³

It may be stated here, that it is the constant practice of the Court, in decrees against a mortgagee, or against an executor to account, to direct it without *future* words; and yet, if the person decreed to account receive anything subsequent to the decree, it may be inquired into before the Master, and the defendants, in such case, must bring the sums so received to account:⁴ the

¹ See *Copeland v. Crane*, 9 Pick, 73.

² 1 Moll. 928.

³ 1 Moll. 231.

⁴ *Bulstrode v. Bradley*, 3 Atk. 582; see also, *Bell v. Read*, ib. 592. The account remains open down to the time of the report. *Holabird v. Burr*, 17 Conn. 563, 564; *Smith v. Brush*, 11 Conn. 366; *Robinson v. Bland*, 2 Burr. 1086.

consequence of this rule is, that in decrees of this nature, the practice generally is, where the matter has been long pending in the Master's office, since the first charge against the accounting party was brought in, to examine again, upon interrogatories, just before the Master is prepared to make his report; and then, if it appears that he has received anything subsequent to his last examination, to carry in a further charge.

When the charge has been allowed, the accounting party must carry in his "discharge."¹ If he does not do so within a reasonable time after the charge has been allowed, the party conducting the account must take out and serve upon him a warrant, underwritten "*at which time the said A. B. is to bring in his discharge,*" &c. This warrant is peremptory, and if it is not obeyed, or the accounting party does not appear and crave further time, the Master may proceed, if otherwise in a situation to do so, to make a report, without the discharge, charging the defendant with the whole amount of the charge as allowed.²

This discharge is usually a transcript from the payments he has made, as stated either in his debtor and creditor account, or in his answer or examination, or the schedules attached to them, and a warrant on leaving and to proceed should be taken out upon it and served in the usual manner. A discharge, as well as any other matter before the Master, may be the subject of an examination for impertinence.³ The accounting party is bound to use all due diligence in obtaining and attending warrants to vouch his discharge; or the party interested in the account may take out

And in Massachusetts, on a bill in Equity to redeem, the account of the mortgagee is to be made up of the amount due at the time of the decree for redemption. *Adams v. Brown*, 7 Cush. 223, 224; *Mann v. Richardson*, 21 Pick. 355; *Stewart v. Clark*, 11 Metcalf, 384; ante, 1016, 1017, note.

Where the mortgagee has received rents between the report and time for payment, though default was made, there must be a further order for account and new day for payment. See *Alden v. Foster*, 5 Beav. 592; *Ellis v. Griffiths*, 7 Beav. 83; *Buchanan v. Greenway*, 12 Beav. 355; *Garlick v. Jackson*, 4 Beav. 154. But it is otherwise where the mortgagee merely receives rents after default on the day fixed for payment. *Constable v. Hawick*, 1 Seaton on Dec. (3d Eng. ed.) 394.

¹ And so if a plaintiff carries in a further charge, or an amended charge, the defendant must have an opportunity of carrying a further discharge, and of explaining his case by evidence. See *Napier v. Staples*, *ubi supra*.

² 2 Smith, 121.

³ *Price v. Shaw*, 2 Cox, 184.

warrants to compel his attendance for that purpose;¹ and if, upon the return of such warrants, the party does not attend and proceed, or account, to the Master's satisfaction, for his not proceeding, the Master will disallow the discharge, or such part of it as the party has omitted to support. The Master, however, will, if he sees the party anxious, and that he does his best to support his discharge, afford him every indulgence,² and in *Ridifer v. O'Brien*,³ where an executor was unable to produce sufficient evidence before the Master in support of his discharge, the Master, in his report, stated the payments insisted upon in the discharge, and that he had not allowed them, as no sufficient evidence had been produced before him to warrant that allowance, *but that he had received them as a claim*, and an exception to his report was overruled.

The account is vouched, by the production of the proper vouchers, such as receipts, &c.,⁴ which documents, when produced, are marked either by the Master or his clerk, with the initials of his name, as a token of his inspection or allowance of them. It seems, that the party producing vouchers does so at his peril, and that the Master is bound to admit them in evidence, unless the other side can lay a reasonable ground to show that the voucher in question can be impeached, of which the Master is to judge.⁵

In a case in Ireland, Sir Anthony Hart, L. C., states the practice in England, where the item exceeds 40s., for the executor to produce the voucher, and to verify, by affidavit, the payment of the sums therein specified; and then, if no objection is made, the Master gives the executor credit in the account. But if any party objects, the Master then requires the affidavit of the person who received the money; and, if this cannot be had, he then requires the affidavit of some person to verify the signature of the voucher.⁶

¹ Bennett, 85.

² 2 Smith, 121.

³ 3 Mad. 43.

⁴ As to proof by entries made by a party in his books of account, confirmed by his oath, according to the practice of many of the States, see 1 Greenl. Ev. § 118, 119, and notes; 1 U. States Dig. 51 et seq., *Accounts*, § 5, pl. 112, &c.; *Callender v. Colgrove*, 17 Conn. 1.

⁵ *Earl of Lonsdale v. Wordsworth*, 28th May, 1789; cited Bennett, 85.

⁶ *Bingham v. Lady Clanmorris*, 2 Moll. 20. In accounting before the Master, the oath of the party should not be received to support charges, which, from their nature, admit of full proof. *Harding v. Handy*, 11 Wheat. 103.

It is to be observed, that the necessity for producing the proper vouchers in support of the discharge, is not removed by the circumstance of the defendant's answer, in which the items are sworn to, not having been replied to; although, in other cases, an answer which has not been replied to, is to be taken as true. The Master must, nevertheless, require the vouchers to be produced.¹

It may be mentioned here, that the ordinary course of proceeding upon discharges in the Master's Office, is by affidavit; and though, in strictness, in cases where infants are concerned, all evidence should be upon examination by interrogatories, yet still, as we have seen, if the solicitor for the infant acquiesces in the reception of affidavits, the infant will be bound by it. In a case in Ireland, before Sir A. Hart, L. C.,² where an infant was interested, an order appears to have been made by his Lordship to restrain the defendant, who was an executor, from issuing a commission to examine witnesses in aid of his account, and he was ordered to verify, by affidavit, the several vouchers on which he sought credit.

All vouchers produced before a Master must be stamped with the proper stamp applicable to the instrument, otherwise they will be rejected. When a voucher has been produced and allowed, the Master or clerk marks it with the initials of his name, as a token of his inspection and allowance of them.³

Should any item occur, which cannot, at the moment be satisfactorily explained, or the voucher for it produced, it is marked as a *queried* item, for further inquiry: and should there be any such item remaining when the others are disposed of, a warrant is obtained and served by the plaintiff's solicitor, and underwritten, "*to proceed on the queried items in the defendant's discharge*"; on the attendance upon which, such explanation as may be given, and the evidence adduced, in support of the queried item, is discussed and read.⁴ If the defendant does not attend and support the queried items, or crave further time, the whole of such items may be disallowed by the Master, or he may direct a further warrant to be taken out to give the party an opportunity of setting himself right before he proceeds to disallow the payment.⁵

¹ Davenport v. Davenport, 1 Sim. 512.

² Young v. Reynolds, 2 Moll. 21, n.

³ Bennett, 85.

⁴ Ibid.

⁵ 2 Smith, 132, 3d ed.

Although, strictly speaking, every payment insisted upon in the discharge, where it amounts to forty shillings and upwards, must be established by a proper voucher, sums under forty shillings may be substantiated by the oath of the accounting party.¹ This rule appears to have been adopted from analogy to the rule at Law in accounts, and as it is not sufficient at Law that the party should swear, to his belief only, that the money has been paid, but he must swear to the fact; so, in accounts under decrees in Equity, it is not sufficient to swear that he believes he paid the money, but he must peremptorily swear to the fact.²

But although it is the general rule that every item in a discharge, of forty shillings and upwards, must be supported by a

¹ *Anon.* 1 Vern. 283; *Marshfield v. Weston*, 2 Vern. 176; *Bingham v. Lady Clanmorris*, 1 Moll. 20; *Everard v. Warren*, 2 Cha. Ca. 249; but although a defendant in account shall be discharged by his oath of sums under 40s., a party shall not, by way of charge, charge another party so. *Ibid.* See also, *Marshfield v. Weston*, 2 Vern. 176. In *Whicherley v. Whicherley*, 1 Vern. 470, the Court having been informed that the course of the Court was, that an accountant was to be allowed, on his own oath, all sums not exceeding 40s. each, so as the whole sum was not above 100*l.*, declared the rule seemed very unreasonable, and would consider how to rectify it. In *Remsen v. Remsen*, 2 John. Ch. 501, it is remarked by Chancellor Kent, "It is understood to be the settled course of the Court, that upon the defendant accounting before the Master, he is to be allowed, on his own oath being credible and uncontradicted, sums not exceeding forty shillings each; but then he must mention to whom paid, for what, and when, and he must swear positively to the fact, and not as to belief only, and the whole of the items so established must not exceed a hundred pounds; and the defendant cannot, by way of charge, charge another person in this way. The forty shillings sterling was the sum established in the early history of the Court, and perhaps twenty dollars would not now be deemed an unreasonable substitute." The Revised Statutes of New York have fixed the sum at twenty dollars for such cases in the settlement of the accounts of executors and administrators. But such allowances are not in the whole to exceed five hundred dollars, for payments in behalf of any one estate. 2 Rev. Stat. 92, § 55. It has been decided in Maine, at Law, that the books of a party, accompanied by his oath, are not sufficient proof of a charge of twenty-six dollars in money; the sum of forty shillings, or six dollars and sixty-seven cents, is the extent that Courts have permitted to be proved in this way. *Dunn v. Whitney*, 1 Fairf. 9. So held also in Massachusetts. *Union Bank v. Knapp*, 3 Pick. 109; *Burns v. Fay*, 14 Pick. 8; *Bailey v. Blanchard*, 12 Pick. 166. See *Cogswell v. Dolliver*, 2 Mass. 217; *Prince v. Smith*, 4 Mass. 455; *Craven v. Shaird*, 2 Halst. 345; *Ducoign v. Schreppel*, 1 Yeates, 347; *Case v. Potter*, 8 John. 211.

² *Robinson v. Cumming*, 2 Atk. 409, 410. But query, whether an executor may not support his discharge by swearing to his belief that sums under 40s. were paid by his testator himself.

proper voucher, there are cases in which a party has been allowed to discharge himself by other means than the ordinary vouchers; thus where the evidence in support of a charge, consists of entries in books kept by the party himself, the party has a right to make use of entries in the same book in support of his discharge.¹ And so, if a paper is produced by one of the parties, from which he takes his charge, the same paper may be read by the other party by way of discharge;² thus where an account, furnished by a party before any suit instituted, is produced to charge him with the items on the debit side, he is entitled to resort to the credit side in support of his discharge.³

This rule is adopted, in Equity, from analogy to the rule at Law, which provides — “that if, to prove a debt, it be sworn that the defendant confessed it, but withal said at the same time, that he paid it, his confession shall be valid as to the payment as well as that he owed it.”⁴ Upon this principle, it is held, that where a man, by his answer or examination, admits that he has received certain sums, which sums he had paid, &c., *the discharge following in the same sentence*, that will be sufficient to discharge him.⁵

¹ *Darston v. Earl of Oxford*, 1 Eq. Ca. Ab. 10, pl. 9. In taking an account between partners, entries on the partnership books, to which both had access at the time the entries were made, are to be considered as *prima facie* correct; but subject to the right of either party to show errors or mistakes in the account. *Heartt v. Corning*, 3 Paige, 566; *Stoughton v. Lynch*, 2 John. Ch. 218; *Lodge v. Prichard*, 3 De G., Mac. & G. 906; *Smith v. Chandos*, 2 Atk. 158; *Morehouse v. Newton*, 3 De G. & Sm. 307. But entries made by one partner without the knowledge of the other, do not, of course, prejudice the latter between him and his copartner. *Hutchinson v. Smith*, 5 Ir. Eq. 117. It is sufficient to examine and state the books of the copartners, without requiring vouchers in support of each particular item. *Fletcher v. Pollard*, 2 Hen. & Munf. 544; *Brickhouse v. Hunter*, 4 Hen. & Munf. 363. See *Turner v. Hughes*, 1 Busbee Eq. (N. C.) 116; *Reed v. Jones*, 8 Wis. 421.

² *Carter v. Lord Colrain*, Barnadist. 126, acknowledged to be correct, 2 B. & B. 386. See *Method. Epis. Church v. Jacques*, 3 John. Ch. 81.

³ *Boardman v. Jackson*, 2 B. & B. 382. In *Jones v. Jones*, 4 Hen. & Munf. 447, it was held by Chancellor Tay'or, that the general rule of law is, that where you take an account of one of the parties as evidence against him, you must admit it to be evidence for him; but this is only so far as the account would itself be evidence if proved by other means. See *Waggoner v. Gray*, 2 Hen. & Munf. 603; *Jones v. Jones*, 4 Hen. & Munf. 447; *Freeland v. Cocke*, 3 Munf. 352; *Robertson v. Archer*, 5 Rand. 319. This last rule is said, however, not to be applicable to an executor's account, nor to any case where there is a trust or confidence. *Robertson v. Archer*, 5 Rand. 319. See note 6, p. 1227.

⁴ *Trials per pais*, Vol. 2, 363.

⁵ *Ridgeway v. Darwin*, 7 Ves. 404.

It is to be observed, that it is considered necessary, in order to entitle the party charged by his own answer, to read such answer in support of his discharge, that the discharge should be by the same sentence with the charge. If it occurs in another part of the answer, it cannot be made use of;¹ and it has been held that a party charging himself in a schedule to his answer, cannot discharge himself by another schedule to the same answer, stating his disbursements;² *a fortiori*, he is precluded from discharging himself, in this way, by affidavit.³ And it seems that it is not only necessary that the discharge should be by the same sentence with the charge, but it must form as it were one and the same transaction.⁴ In *Thompson v. Lambe*,⁵ Lord Eldon said, "I am clearly of opinion that a person, charged by his answer, cannot, by his answer, discharge himself; nor even by his examination, unless it is in this way: if the answer or examination states that upon a particular day he received a sum of money, and paid it over, that may discharge him; but if he says that upon a particular day he received a sum of money, and upon a subsequent day he paid it over, that cannot be used in his discharge; for it is a different transaction." Upon the same principle it has been held, that a party charged with one sum of money, cannot discharge himself by distinct independent items on the other side of the account.⁶

¹ *Robinson v. Seotney*, 19 Ves. 582.

² *Boardman v. Jackson*, 2 B. & B. 382.

³ *Ridgeway v. Darwin*, 7 Ves. 404.

⁴ See *Hart v. Ten Eyck*, 2 John. Ch. 89.

⁵ 7 Ves. 588.

⁶ *Robinson v. Seotney*, *ubi supra*. See *Freeland v. Cocke*, 3 Munf. 352; *Jones v. Jones*, 4 Hen. & Munf. 447; *Waggoner v. Gray*, 2 Hen. & Munf. 603. The authorities on this point were very thoroughly sifted by Chancellor Kent in the case of *Hart v. Ten Eyck*, 2 John. Ch. at pages 87 to 98. That was a case in which administrators were called upon to account. The Chancellor there arrives at the conclusion in reference to this matter, that where the answer is put in issue, what is confessed and admitted need not be proved; but where the defendant admits a fact, and insists on a distinct fact by way of avoidance, he must prove the fact so insisted on in defence. In the case of *Talbot v. Rutledge*, cited and stated at length in *Blount v. Burrow*, 4 Bro. C. C. (Perkins's ed.) 74, 75, Lord Chancellor Hardwicke is said to have remarked, "In this Court [of Chancery] if a man is to be charged by a book, or other writing, he shall also be discharged, if the entries are made for that purpose therein; and so have been many cases relating to goldsmiths' and merchants' accounts. But what is sworn by a man's answer or examination, admits of a different consideration; as, if a man admits, by his answer, that he received several sums at particular times, and

It seems, also, that where the account is of long standing, the Court will sometimes permit the accounting party to discharge in the same answer swears that he paid away those sums at other times in discharge, he must prove his discharge, otherwise it would be to allow a man to swear for himself, and to be his own witness." Chancellor Kent cites this case of *Talbot v. Rutledge*, with approbation, in *Hart v. Ten Eyck*, 2 John. Ch. 89, 90, so far as it refers to the answer of a party. In the case of *Talbot v. Rutledge*, the defendant was examined on oath, on taking an account before the Master, and he acknowledged the receipt of some moneys, but stated that he had disbursed them at other times, on account of the concern. The Master on this proof charged him with the receipt, and put him upon proof of the discharge, and Lord Hardwicke confirmed the report. In another case decided by Lord Hardwicke, (*Kirkpatrick v. Love*, Ambler, 589,) it appeared that the plaintiffs had dealings with the defendant, in the way of merchandise, and on a decree for an account, both parties were to be examined. On taking the account, the plaintiffs admitted the receipt of some goods, and in the same sentence said, they had paid the defendant for them, and the question was whether they were bound to prove the payment. Lord Hardwicke held not, as they charged and discharged themselves *in the same sentence*; but that it would have been otherwise, if the discharge or avoidance had been in a different sentence. In reference to these two decisions, Chancellor Kent remarks, "If these two decisions are correctly reported, I cannot undertake to reconcile them; but neither of them applies to the point how far the *answer* will of itself support a matter set up by way of avoidance or discharge. It appears to me that there is a clear distinction, as to proof, between the *answer* of the defendant and his examination as a *witness*. At any rate, the question how far the matter set up in the answer can avail the defendant, without proof, is decidedly and rationally settled." *Hart v. Ten Eyck*, 2 John. Ch. 88. This point was also considered in *Fisler v. Porch*, 2 Stockt. (N. J.) 243, 248, 249; *Hutchinson v. Tindall*, 2 Green Ch. (N. J.) 357. See *Beckworth v. Butler*, 1 Wash. 224; *Paynes v. Coles*, 1 Munf. 373; *Neal v. Robinson*, 8 Humphreys, 435; *Allender v. Vestry of Trinity Church*, 3 Gill, 166. But see *Woodcock v. Bennet*, 1 Cowen, 742 to 748, and note to page 744, in which it is stated that the decision of Chancellor Kent, in *Hart v. Ten Eyck*, 2 John Ch. 87 to 94, was reversed on the point relating to the effect of an answer as stated above. In the same note is Mr. Emmet's able argument in favor of the appellants from the Chancellor's decision. In *Woodcock v. Bennet*, in Error, 1 Cowen, 711, it was held, that where an answer to a bill filed is responsive to the bill, and within the discovery sought, it is legal evidence in all cases; and this, whether it is a denial of some fact alleged by the plaintiff, or sets up a fact by way of avoidance merely. See *Forsyth v. Clark*, 3 Wendell, 643; *Stafford v. Bryan*, 1 Paige, 239. See the doctrine, as to the effect of allegations in an answer not responsive to the bill, stated, and the authorities cited, ante, p. 840 to 842 in note. See also *Thompson v. Lambe*, 7 Sumner's Vesey, 587, Perkins's note (b). In reference to the difference in effect between the answer of the defendant and his examination as a *witness*, above suggested, see *Hollister v. Barkley*, 11 N. Hamp. 501, 509, 510, where it is held that the statements of a party under oath upon the taking of an account, cannot have the character or effect of matter in an answer respon-

himself, upon oath, of all such matters as he cannot prove by vouchers, by reason of their loss; this was done in *Peyton v. Green*,¹ where, in regard that the account in question was of twenty years' standing, it was ordered that the defendant should prove his account by his own oath, for what he could not prove by books or cancelled bonds; and, in *Holsteomb v. Rivers*,² a similar direction was given, where the account was of fourteen years' standing only.

It appears, also, that if executors or trustees have been led to divest themselves of the fund, by paying it over to their co-trustees or co-executors, the Court will, on a proper case, permit the executor or trustee so paying it over, to discharge himself by his own oath, and that it will do this in preference to permitting one co-executor or trustee to exhibit interrogatories for the examination of the others.³

But although, in the instances above stated, and in many others, the Court has declared upon the hearing of the cause, that in the circumstances under which the bill has been filed it would apply a different rule of proof from that which is ordinarily applied; it is only when such declaration forms part of the order of the Court directing the account, or upon an order made under special circumstances, that the Master will be authorized to allow a party to discharge himself by his own oath, from the sums proved to have come to his hands.⁴

It may be noticed with reference to this part of the subject, that sive to the bill, except, perhaps, so far as they are answers to the interrogatories of the other party, or explanations of such answers. In *Higbee v. Bacon*, 8 Pick. 484, it was held, that if an administrator, in answer to interrogatories in the Probate Court, touching his account, makes an admission tending to charge himself with estate omitted in his account, and at the same time states a fact in his discharge, unsupported by proof, such statement must be rejected as irrelevant. But see *Neal v. Robinson*, 8 Humphreys, 435.

¹ 1 Cha. Rep. 146; 1 Eq. Ca. Ab. 11 S. C.

² 1 Cha. Ca. 127.

³ *Dines v. Scott*, 1 T. & R. 358.

⁴ *Ibid.*; and see *Maddeford v. Austwick*, 11 Sim. 209. Before the Statute of Massachusetts making parties witnesses, an executor, though bound to make oath to the truth and correctness of his accounts, and to answer such specific interrogatories as may be put to him touching the same, could not be admitted upon his own motion, as a competent witness generally to his accounts and their items, except to support small charges, not exceeding forty shillings, according to the usage in Probate Courts. *Bailey v. Blanchard*, 12 Pick. 166.

there are many cases in which the Court decreeing an account, directs it to be taken with the admission of certain documents or testimonies not having the character of legal evidence; thus if parties have been permitted, for a long series of years, to deal with property as their own, considering themselves under no obligation to keep accounts as if there was any adverse interest, having no reason to believe the property belonged to another; though it would not follow, that, being unable to give an accurate account, they should keep the property, yet the account would be directed, not according to strict course, but in such a manner as, under all the circumstances, would be fit.¹ It is to be observed, however, that it is not for the Master to decide, in such cases, as to the propriety of departing from the ordinary course of proceeding: — he cannot do so without the order of the Court, and that an order of the Court to this effect will not always be made until the difficulty of proceeding in the usual mode has become apparent upon an attempt to pursue it in the Master's Office; thus, in *Lupton v. White*,² the Court refused to make such an order prospectively, but gave liberty to either party, if the Master in taking the account should find difficulty as to receiving any evidence, to apply to the Court for directions upon that particular point.

It may be mentioned here, that the Court will not allow anything to be placed to account, under the name of general expenses, but that the party must name the particulars.³ So, also, where a party discharges himself, upon his oath, of sums under 40s., he must, in his affidavit, mention unto whom paid and for what and when.⁴

In almost every decree directing accounts to be taken by the Master, there is inserted a declaration that "the Master is to make unto the parties all just allowances."⁵ Under this direction, the Master is authorized to allow the parties such disbursements as may appear to have been fairly and properly made by

¹ See *Lupton v. White*, 15 Ves. 433 – 443.

² *Ubi supra*.

³ Anon. 1 Eq. Ca. Ab. 11. The allowance of a sum in gross, in an administration account, without items or explanations, is improper. *Swan v. Wheeler*, 4 Day, 137. See *Field v. Hitchcock*, 14 Pick. 405. The items on the credit side of an account, in the Orphans' Court of New Jersey, may be expressed in general terms. *Liddell v. M'Vickar*, 6 Halst. 44.

⁴ Anon. 1 Vern. 283.

⁵ *Seaton on Decrees*, 42.

them. It is to be observed, that it is not the ordinary course for the Court, in matters of this nature, to say, in the first instance, what is a just allowance; but that it generally leaves the determination as to what is to be considered a just allowance to the Master, and that the Court is not called upon to decide it, except upon exceptions to the report.¹ In *Cook v. Collingridge*,² however, Lord Eldon, under the special circumstances of the case, made it part of the order that, as to such part of the allowance as should be claimed and objected to before the Master, he was to state his reasons for allowing or disallowing the same.³

With respect to what, by the practice of the Court, may be considered as just allowances, that must depend very much upon the circumstances of each case; it is, however, a settled rule that whatever a trustee or personal representative has expended in the fair execution of his trust, may be allowed him in passing his accounts; thus, where the decrec, in a suit by residuary legatees, directed an account to be taken of the personal estate of a testator, *and of his debts and funeral expenses*, and the personal estate was ordered to be applied in payment of the debts and funeral expenses in a course of administration, and the Master allowed payments in discharge of legacies, it was held, that the payment of legacies, in such an account, was the subject of a just allowance, as the plaintiff could be entitled to nothing until the legacies were paid.⁴ So where a trustee, in the fair execution of his trust, has expended money by reasonably and properly taking opinions and procuring directions necessary to the due execution of his trust, he is entitled not only to his costs, but to his charges and expenses, under the head of *just allowances*.⁵ So, also, is the next friend of an infant; for as the infant himself cannot incur charges and expenses, if they cannot be claimed as just allowances, and

¹ *Brown v. Detestet*, Jac. 284–294. See *Peyton v. Smith*, 2 Dev. & Bat. 325; *Wright v. Wright*, 2 M'Cord Ch. 195; *Adams v. Brown*, 7 Cushing, 220; *Reed v. Reed*, 10 Pick. 398; *Boston Iron Co. v. King*, 2 Cushing, 405, 406; *Sparhawk v. Wills*, 5 Gray, 423; *Howe v. Russell*, 36 Maine, 115; *Ashmead v. Colby*, 26 Conn. 289, 312, 313.

² Jac. 607.

³ *Ibid.* 625.

⁴ *Nightingale v. Lawson*, 1 Cox, 23.

⁵ *Fearn v. Young*, 10 Ves. 184. See *Wham v. Love*, Rice Eq. 51; *The Bank v. Trapier*, 2 Hill Ch. 26.

the next friend is to be at the whole expense of the infant beyond his costs, persons will deliberate before they accept the office.¹

The expenses of a sale may also be allowed, under the head of just allowances;² and a widow who was trustee for her son, of the real estate, whereof she was dowable, was allowed, in accounting for the rents and profits, to retain so much thereof as she was entitled to for her dower, under the head of just allowances.³

But although an executor or trustee is of course entitled, under the head of just allowances, to have all the reasonable expenses he may have incurred in the conduct of the trust, he is not entitled to any compensation for personal trouble and loss of time.⁴ This rule applies especially where an executor has an express legacy for his pains; nor will it alter the case, that the executor has renounced and yet is assisting to the executorship, even though it appears that he has deserved something, and benefited the trust to the prejudice of his own affairs.⁵ And, even where an executor had acted as a commission-agent for a testator, in his lifetime, under a power of attorney, and was held entitled on an account to the usual commission on his agency, prior to the death of the testator, he was not allowed to charge commission on the business transacted subsequently to his death.⁶ The same rule has been extended to solicitors and attorneys, who, in the character of executors and trustees, are not allowed any professional charge, or remuneration for loss of time or other emoluments, but only such

¹ *Fearn v. Young*, 10 Ves. 184.

² *Crump v. Baker*, 18 Ves. 285.

³ *Graham v. Graham*, 1 Ves. 262.

⁴ *Robinson v. Pett*, 3 P. Wms. 249; *Scattergood v. Harrison*, Mos. 128; *Brock-sopp v. Barnes*, 5 Mad. 90. See *McWorter v. Benson*, 1 Hopk. 28; *Manning v. Manning*, 1 John. Ch. 547; *Green v. Winter*, ib. 27. But compensation is in general provided for executors and trustees in the United States. See *Toller, Executors* (4th Am. ed.) 456, note (1); 2 *Williams, Executors and Administrators* (2d Am. ed.) 1316; note; *Carrol v. Connel*, 2 J. J. Marsh. 205; *Wright v. Wright*, 2 M'Cord Ch. 195; *Taliaferro v. Minor*, 2 Call, 190; *Triplett v. Jameson*, 2 Munf. 242; *Cavendish v. Fleming*, 3 Munf. 198; *Webb v. Webb*, 6 Monroe, 166; *Gist v. Gist*, 2 M'Cord Ch. 474; *M'Anslan v. Green*, Cam. & Nor. 33; *Wood v. Lee*, 5 Monroe, 65; *Nimmo v. Commonwealth*, 4 Hen. & Munf. 57; *Miller v. Beverleys*, 4 Hen. & Munf. 415, 420; *Logan v. Troutman*, 3 A. K. Marsh. 66; *Walker's Estate*, 9 Serg. & R. 223; *M'Pherson v. Israel*, 5 Gill & John. 60; *Lee v. Lee*, 6 Gill & John. 316; *Jennison v. Hapgood*, 10 Pick. 77; *Gibson v. Crehore*, 5 Pick. 161; *Wilson v. Wilson*, 3 Binney, 557.

⁵ *Robinson v. Pett*, *ubi supra*.

⁶ *Sheriff v. Axe*, 4 Russ. 33.

charges and expenses, actually paid by them out of pocket, as the Master may find to have been properly incurred and paid.¹

But although an executor or trustee, who acts himself as solicitor in the affairs of his trust cannot be allowed anything for his professional assistance beyond what he has actually paid out of pocket, an executor or trustee who requires the assistance of a solicitor, in the execution of his trust, will be allowed the amount of what he has *properly* paid to such solicitor, in respect of his bill of costs;² he will not, however, be allowed, without question, whatever sum he thinks proper to pay to his solicitor, but the practice in cases of this description is, for the Master to hand the solicitor's bill over to the proper officer to be taxed and moderated, without proceeding to a regular taxation.³

The Court also holds, that where it is necessary to the due execution of their office, that trustees, &c., should employ accountants,⁴ agents, or receivers, under them, they will be entitled to be allowed the costs of such agents or receivers;⁵ and thus where a testator died possessed of several houses let at weekly rents, the Court held the trustees justified in paying a person to collect such rents, even though the testator had, by his will, given his trustees small annuities for their trouble.⁶

It is to be observed that agency will only be allowed where another party has been employed by the executor, and that an

¹ *Moore v. Frowd*, 3 M. & C. 45; see also, *New v. Jones*, 9 Blythewood's Convey, by Jarman, p. 338.

² See *Pusey v. Clemson*, 9 Serg. & R. 209; *Bryson v. Nichols*, 2 Hill Ch. 121; *Branham v. Commonwealth*, 7 J. J. Marsh. 190; *Crofton v. Ilsley*, 6 Greenl. 48; *Sterrett's Appeal*, 2 Pennsylv. 419; *Liddell v. M'Vickar*, 6 Halst. 44.

³ *Johnson v. Telford*, 3 Russ. 477. See *Liddell v. M'Vickar*, 6 Halst. 44. An executor or administrator ought to be credited in his administration account for fees paid to counsel, although those fees were more than the law allowed. *Lindsay v. Homerton*, 2 Hen. & Munf. 9.

⁴ *Henderson v. M'Iver*, 3 Mad. 475.

⁵ *Vanderheyden v. Vanderheyden*, 2 Paige, 287. Where an administrator employed an agent to collect money for the estate under his care, no resort being had to legal process, and the agent being neither a public officer nor an attorney, it was held, that the compensation for such agent was not a charge upon the estate. *Gwynn v. Dorsey*, 4 Gill & John. 453.

⁶ *Wilkinson v. Wilkinson*, 2 S. & S. 237; but see *Weiss v. Dill*, 3 M. & K. 26, where it was held, that an executor will not be allowed to charge for an agent, except under very special circumstances, and that a Master's report, reducing the executor's charge, for the employment of such agent, from 5 per cent to 2 1-2 per cent was correct.

executor will not be allowed to charge for his own agency, even though he had acted as agent for the testator in his lifetime.¹ The rule, however, is different with regard to executors in the East Indies; there, it seems, a different rule prevails: — according to the course of the Courts in India, and the usage there, an executor is entitled to a commission of five per cent for collecting the estate of the testator; the Court here, therefore, will make the same allowance to an Indian executor passing his accounts in this country; ² and, it seems, the executor will be entitled to such commission, although he has a legacy given him by the will, provided it is not expressly given to him in the character of executor,³ and that he will be allowed to charge it on all the assets of the testator collected by him in India; including the assets, which he retains in respect of his own legacy, and the moneys belonging to the testator which were in the hands of a commercial house in which the executor was, and the testator had been a partner.⁴

It may be noticed here, that where a substantive claim, for a specific allowance, (as for commission upon receipts in India,) has been made by the answer, and no special direction has been founded upon it in the decree, the Master will not be justified in making such an allowance under the head of “just allowances”;⁵ the proper inference to be drawn from the fact of the claim, made by the answer, not being noticed in the decree, being either that the Court did not think it proper to be allowed, or that the party making it had abandoned it.

It seems, moreover, that claims cannot be allowed to a defendant, under the head of just allowances, unless they are immediately connected with the transactions in respect of which the account is decreed. Thus in a suit against a steward and land agent, where the decree directed an account to be taken of rents, profits, and timber money received by the defendant on the plaintiff's account, and also directed the Master to make to the parties all just allowances, it was held, that the Master could not under the head “just allowances,” permit the defendant to set off the

¹ *Sheriff v. Cox*, 4 Russ. 53.

² *Chetham v. Lord Audley*, 4 Ves. 72; *Poole v. Larkins*, ib.; *Cockerell v. Barber*, 1 Sim. 23.

³ *Cockerell v. Barber*, *ubi supra*.

⁴ *Ibid*.

⁵ *E. I. Company v. Keighly*, 4 Mad. 38.

amount of certain bills of costs due from the plaintiff to him as a solicitor.¹

Accounts in Suits for Redemption of Mortgaged Premises.

In a suit for redemption of mortgaged premises, it is provided by statute in Massachusetts, that “if the mortgagee or any person under him has had possession of the premises, he shall account for the rents and profits, and shall be allowed for all sums expended in reasonable repairs and improvements, all sums paid for lawful taxes and assessments, and all other necessary expenses in the care and management of the premises. If on such account there is a balance due from him, it shall be considered as so much paid towards the debt due on the mortgage. If there is a balance due him, it shall be added to the debt, and be paid or tendered as such.” General Statutes, c. 14, s. 15.²

The form of decree generally made in such a case, so far as it concerns the Master, is, “that it be referred to, &c., to take an account of what is due to the defendant for principal and interest on the mortgage in the pleadings mentioned, and that the said Master do also take an account of the rents and profits of the said mortgaged premises received by the defendant, or by any other person or persons by his order, or for his use, since the day of , or which without his wilful default,³ might have been received thereout. And what shall be coming on the said account of rents and profits to be deducted out of what shall be found due to the defendant for principal and interest. And in case the said

¹ Joliffe v. Hector, 12 Sim. 398. Expenses and services, which have been rendered necessary through the fault of the administrator, will not be allowed for in the settlement of his account. See Brackett v. Tillotson, 4 N. Hamp. 208. But unfaithful administration will not deprive an executor of his right to compensation for services, so far as they have been beneficial to the estate. Jennison v. Hapgood, 10 Pick. 77.

² The mortgagee in possession is said to be *the steward or bailiff* of the mortgagor, without a salary, Cholmondeley v. Clinton, 2 Jac. & Walk. 179, and, as such, accountable to him or his assignee, Ruckman v. Astor, 9 Paige, 517, or to a subsequent mortgagee, Moore v. Degraw, 1 Halst. Ch. (N. J.) 346, for the rents and profits.

³ Sometimes instead of the words “without his wilful default,” the words, “with ordinary care and diligence” are inserted. See Burnet v. Claghry, 1 January, 1821, Hoff. Masters in Chancery (ed. 1824,) 242. See, also, 2 Turner’s Pract. 188, note; Seaton’s Forms (Am. ed. 1831) 106, 107; 4 Kent (10th ed.) 142.

Master shall find the said defendant has been in possession and held the said premises, as owner thereof, then the said Master is to set a rent thereon, and take the account accordingly. And in taking the said account he is to make the parties all just allowances, and particularly for all necessary repairs and lasting improvements, which have been made by the defendant on the said mortgaged premises since the, &c.”¹

The party applying to redeem should bring in a charge stating the rents and profits received, or what he claims on the ground of a wilful default or gross negligence in not receiving, what the party, if in the occupation of the premises, should be charged with as a fair rent, and any charge upon the ground of waste or spoliation, with any other item properly to be brought against the defendant under the decree. This is to be proceeded upon in the usual manner; and when the charge is settled, the defendant's discharge should be brought in, containing a statement of the amount due upon the bond or note and mortgage, expenditures in repairs and in improvements or their value, and all other allowances claimed by him.²

As to the rents and profits. The mortgagee is bound to make all reasonable efforts to rent the premises.³ By taking possession he imposes upon himself the duty of an ordinarily provident owner, and he is bound to obtain what such an owner would, with reasonable diligence, have received.⁴ As any person may be a mortgagee, so any person may, in the exercise of his right on default of the mortgagor to pay his debt, find it necessary to occupy the position of a mortgagee in possession, and to account for his care and management of the mortgaged premises. Hence he should, as a general rule, be held chargeable only with the rents actually received by him, or with those which he might have received by the exercise of ordinary care and diligence, as it is

¹ Hoff. Mast. in Chan. 241; Seaton, Forms (Am. ed. 1831) 106, 109.

² Hoff. Mast. in Chan. 242, 243.

³ Per Dewey J., in *Sparhawk v. Wills*, 5 Gray, 429.

⁴ *Williams v. Price*, 1 Sim. & Stu. 581; 4 Kent (10th ed.) 192; *Miller v. Lincoln*, 6 Gray, 556; *Hughes v. Williams*, 12 Vesey, 493; 3 Powell on Mort. 949 a, note; *Benham v. Rowe*, 2 Cal. 387; *Shaeffer v. Chambers*, 2 Halst. Ch. (N. J.) 548. The mortgagee is trustee for the mortgagor only to a very limited extent. *King v. State Mut. Fire Ins. Co.* 7 Cushing, 7, 8; *Clarke v. Sibley*, 13 Metcalf, 213; *Russell v. Southard*, 12 Howard (U. S.) 154, 155.

sometimes expressed, or without wilful default or gross negligence, as it is at other times expressed.¹ Actual fraud is not necessary to charge a mortgagee in possession; it is sufficient, if there is plain, obvious, and gross negligence, by not making use of facts within his knowledge; as, for instance, he will be chargeable with an amount of rent for which the premises were held by a sufficient tenant turned out by him, or which would have been given by a sufficient tenant, whom he has refused to accept.²

But the mortgagee is not bound to engage in adventures and speculations for the benefit of the mortgagor, and he is not to be affected by the inquiry, whether some person would not have given more, if the fact was not communicated to him.³

He is, however, accountable for the rent during the time he suffers a notoriously insolvent tenant to occupy the premises,⁴ deducting the time reasonably necessary to expel him by legal means, and to obtain a responsible tenant.⁵ But he is not responsible for rent due from a tenant, who absconds, if he has not been guilty of negligence.⁶

If the mortgagee himself occupies the estate, he is liable to account for the fair rent of the premises.⁷

But he will not be charged for rents and profits which have arisen exclusively from his own expenditures in improvements,

¹ *Sparhawk v. Wills*, 5 Gray, 429, 430; *Miller v. Lincoln*, 6 Gray, 556; *Anon.* 1 Vern. 45; *Hughes v. Williams*, 12 Vesey, 493; *Rowe v. Wood*, 2 Jac. & W. 556; *Anthony v. Rogers*, 20 Missou. (5 Bennett) 281; *Jewett v. Cunard*, 3 Wood. & Minot, 277.

² *Anon.* 1 Vern. 45; *Hughes v. Williams*, 12 Vesey, 494, 495; *Beare v. Prior*, 6 Beavan, 183. See *Shaeffer v. Chambers*, 2 Halst. Ch. (N. J.) 557.

³ *Hughes v. Williams*, 12 Vesey, 496.

⁴ *Miller v. Lincoln*, 6 Gray, 556; *Coote Mort.* 561; *Hagthorp v. Hook*, 1 Gill & J. 270; *Neale v. Hagthorp*, 3 Bland, 590. Being a trustee, to some extent, the mortgagee will be held responsible for the rents and profits in case of his assigning the estate to a notoriously insolvent person, without the mortgagor's consent. 1 *Coote*, 427, 428; *Neale v. Hagthorpe*, 3 Bland, 590.

⁵ *Miller v. Lincoln*, 6 Gray, 556.

⁶ *Saunders v. Frost*, 5 Pick. 259.

⁷ *Trimleston v. Hamill*, 1 Ball & B. 385; *Marony v. O'Dea*, 1 Ball & B. 118; *Moore v. Degraw*, 1 Halst. Ch. (N. J.) 346; *Gordon v. Lewis*, 2 Sumner, 143; *Trulock v. Robey*, 15 Sim. 265; *Holabird v. Burr*, 17 Conn. 556; *Kellogg v. Rockwell*, 19 Conn. 446; *Tucker v. Buffum*, 16 Pick. 46. But to charge a mortgagee in possession with an occupation rent, the mortgagor should allege and show that he actually occupied. *Trulock v. Robey*, *supra*.

which are not allowed for to him in the account.¹ If, however, he has been allowed for the improvements, or they are not made by himself, there is no reason why he should not be charged with the improved rents arising therefrom.²

If the premises are subject to a lease, and the mortgagee enters and claims the rents, he will be charged with the same at the rate reserved in the lease.³ So it has been held that, if the mortgagor makes proof, that the estate was let at a certain price while in the hands of the mortgagee, that will be deemed the rate at which it was let the whole time, unless the contrary is shown by the mortgagee.⁴

If there be wilful default or gross neglect, as to the making of repairs, by which the property is depreciated in value, the mortgagee, who is in possession, is trustee to the mortgagor to that extent, that he ought to be made responsible for the deterioration during the time of his possession.⁵ But he is not bound to leave the estate in the situation in which he found it, if the lapse of time will account for the injury. He ought not to be charged with deterioration arising in the ordinary way, by reason of houses and buildings of a perishable nature, decaying by ruin.⁶ A diminution in value of the rents is not sufficient evidence of a want of proper repairs.⁷ In *Dexter v. Arnold*,⁸ Mr. Justice Story said: "It is also the default of the mortgagor himself, if he does not take care to have suitable repairs made, to preserve his property." If the clearing of land by the mortgagee is shown to be an injury to the estate, he will be charged for the waste; but if it is not an injury, he will not be charged for waste.⁹

¹ *Moore v. Cable*, 1 John. Ch. 385; *Bell v. Mayor of New York*, 10 Paige, 49.

² *Montgomery v. Chadwick*, 7 Clarke (Iowa) 114. See *Givens v. M'Calmont*, 4 Watts, 460; *Merriam v. Barton*, 14 Vermont, 501; *Story v. Shultz*, 1 Hill Ch. 464; *Morrison v. M'Leod*, 2 Ired. Eq. 108.

³ *Trimleston v. Hamill*, 1 Ball & B. 385.

⁴ *Blacklock v. Barnes*, Sel. Cas. in Chan. 53; *Hoff. Mast. in Chan.* 248.

⁵ *Dexter v. Arnold*, 2 Sumner, 126 and note. See *Withrington v. Banks*, Sel. Cas. in Chan. 31, per Baron Price; *Thorne v. Newman*, Finch Rep. 38; *Hoff. Mast. in Chan.* 249. Waste must be charged in bill, and specifically referred to Master. *Gordon v. Hobart*, 2 Story, 243, 260, 261.

⁶ *Russell v. Smithies*, 1 Anst. 96; *Dexter v. Arnold*, 2 Sumner, 126 and note; *Hoff. Mast. in Chan.* 245, 246. As to his liability when he pulls down buildings, see *Soudon v. Hooper*, 6 Beav. 250.

⁷ *Russell v. Smithies*, 1 Anst. 96; *Hoff. Mast. in Chan.* 246.

⁸ 2 Sumner, 127.

⁹ *Givens v. M'Calmont*, 4 Watts, 464. See *Moore v. Cable*, 1 John. Ch. 385.

If a mortgagee continues to occupy the mortgaged premises, or to receive the rents and profits thereof, after his debt has been satisfied, he will be accountable for an occupation rent in the first case, and for the rents and profits received in the latter case, with interest thereon.¹ As soon as he is paid, the mortgagee is regarded in Equity as a mere trustee, holding the legal estate for the benefit of the mortgagor, and he will be charged with interest on the balances retained in his hands from the time he was overpaid.² Where the mortgagee has kept no regular accounts, and it cannot be accurately ascertained from him what rents and profits he has received, the Master must exercise a sound discretion, and upon the whole evidence determine the amount with which he should be charged, as that which he might have received, and must be presumed to have received.³ If the Master can form no satisfactory estimate of the rents and profits actually received by the mortgagee, resort may be had to a fair occupation rent.⁴

If the mortgagee insures his interest at his own expense, and recovers for a loss, he is not bound to account to the mortgagor for any part of the amount recovered, nor to apply it in payment of his debt which is secured by the mortgage.⁵

As to Repairs and Lasting Improvements, and other Allowances to the Mortgagee.

The mortgagee is bound to make reasonable and necessary re-

¹ *Gordon v. Lewis*, 2 Sumner, 143, 147, 148; *Wilson v. Metcalf*, 1 Russ. 535; *Quarrell v. Beckford*, 1 Madd. 269; *Powell on Mort.* 948 *a*, note; *Archdeacon v. Bowes*, 13 Price, 369; *S. C.* 1 McClel. 165. And if a balance be due from the mortgagee, interest upon it will be allowed, although he had not been in possession. *Smith v. Pilkington*, 1 D. F. & J. 136. See *Davis v. May*, Coop. Rep. 238.

² *Quarrell v. Beckford*, 1 Madd. Ch. R. 278; *Smith v. Pilkington*, 1 D. F. & J. 120.

³ *Dexter v. Arnold*, 2 Sumner, 108, 129, 130; *Miller v. Whittier*, 36 Maine, 577. As to the effect of negligence in keeping accounts by a mortgagee or trustee, so that it is impossible to ascertain what is due, see *Codrington v. Parker*, 16 Vesey, 469; *Quarrell v. Beckford*, 13 Vesey, 377; *S. C.* 14 Vesey, 177; *Lupton v. White*, 15 Vesey, 440.

⁴ *Gordon v. Lewis*, 2 Sumner, 143. See *Trulock v. Robey*, 15 Sim. 265.

⁵ *King v. State Mut. Fire Ins. Co.* 7 Cushing, 1; *Ætna Ins. Co. v. Tyler*, 16 Wendell, 385; *Carpenter v. Providence Ins. Co.* 16 Peters, 495; *White v. Brown*, 2 Cushing, 412; *Russell v. Southard*, 12 Howard (U. S.) 139.

pairs;¹ and where he is guilty of wilful default or gross neglect as to repairs, he is properly responsible for the loss and damage caused thereby. But what are reasonable and necessary repairs, and what will be waste in the management of the estate, must depend upon the particular circumstances of the case.² In *Dexter v. Arnold*,³ Mr. Justice Story said:—"If a house is very old and dilapidated, the mortgagee is not bound to go to extraordinary expenses to put it into full repair, if those expenses will be greatly disproportionate to the value of the estate, or to his own interest therein. Certainly it cannot be pretended that he is bound to make new advances on the estate."⁴ In *Godfrey v. Watson*,⁵ Lord Hardwicke said, that a mortgagee in possession is not obliged to lay out money further than to keep the estate in necessary repair. But it is quite a different question, whether if a mortgagee lays out money in proper permanent repairs for the benefit of the estate, he may not be allowed to claim an allowance therefor." The mortgagee will not be allowed any advantage out of the mortgaged estate beyond principal and interest.⁶ But he will be allowed all sums expended by him, in reasonable and necessary repairs and lasting improvements, or other acts for the preservation of the estate mortgaged; and he may add this to the principal of his debt and it will carry interest.⁷ He may, if he sees fit, replace old buildings gone to decay with new ones, for similar uses and purposes, and charge the expense to the estate in rendering his account.⁸

The mortgagee will not be allowed for expenses incurred in making additions to the estate, or in new or ornamental improvements, which are neither necessary to the upholding of the estate,

¹ *Dexter v. Arnold*, 2 Sumner, 125; *Shaeffer v. Chambers*, 2 Halst. Ch. (N. J.) 557; *Godfrey v. Watson*, 3 Atk. 517.

² *Dexter v. Arnold*, 2 Sumner, 125, 126; *Givens v. M'Calmont*, 4 Watts, 460, 463, 434.

³ 2 Sumner, 126.

⁴ *Dexter v. Arnold*, 2 Sumner, 125, 126; *Gordon v. Lewis*, 2 Sumner, 143; *Russell v. Smithies*, 1 Anst. 96; *McCamber v. Gilman*, 15 Ill. 381.

⁵ 3 Atk. 518.

⁶ *Gubbins v. Creed*, 2 Sch. & Lef. 218; *Story J.* in *Gordon v. Lewis*, 2 Sumner, 155; *Walton v. Withington*, 9 Miss. 549.

⁷ *Powell on Mort.* 89; *Hoff. Mast.* in Chan. 246; *Campbell v. Macomb*, 4 John. Ch. 534.

⁸ *Marshall v. Cave*, reported *Powell on Mort.* 957 a.

nor contribute anything to its permanent value.¹ The mortgagee should be allowed for no more of the expenditures for improvements than those which are beneficial to the estate,² except under special circumstances; as where a person, actually mortgagee, honestly supposed himself to be the absolute owner of the premises, and under that belief made improvements on the estate, the mortgagor for several years before and after the improvements asserting no title or interest in the premises, the mortgagee may be allowed for the improvements, even where they amount to more than the rents and profits;³ or, where the holder of the equity looks on in silence, and sees the purchaser of the premises, in good faith, make improvements thereon; in which case he must, when he redeems, allow for the improvements in the account.⁴ All expenses necessary to the preservation of the estate or to its beneficial use and enjoyment, being incurred in good faith, whatever may be the nature of them, may be brought into the account.⁵ The expense of making an aqueduct was allowed to a mortgagee, the charge being small, and it appearing that the aqueduct was necessary for supplying the mortgaged premises with water.⁶

In *Sparhawk v. Wills*,⁷ it appeared that the mortgaged premises were valuable, were handsomely laid out, and had on them many young fruit trees and ornamental trees, which needed care and management, and it was held that if the mortgagee could not, by reasonable diligence, let the estate for a sum sufficient to keep it in a state of reasonable repair, including the preservation of the

¹ *Reed v. Reed*, 10 Pick. 400; *Russell v. Blake*, 2 Pick. 505; *Lowndes v. Chisolm*, 2 McCord Ch. 455; *Hagthorp v. Hook*, 1 Gill. & J. 270; *Hopkins v. Stephenson*, 1 J. J. Marsh. 341; *Quinn v. Brittain*, 1 Hoff. Ch. R. 353; *Clark v. Smith*, Saxton Ch. (N. J.) 121; *Dougherty v. M'Colgan*, 6 Gill. & John. 275; *Bell v. Mayor of New York*, 10 Paige, 49.

² *Reed v. Reed*, 10 Pick. 400; *Gordon v. Lewis*, 2 Sumner, 143, 149, 150; *Moore v. Cable*, 1 John. Ch. 387; *McCarron v. Cassidy*, 18 Ark. 34. In this last case it was held, that a mortgagee in possession, having no special authority to make improvements, will be allowed only for such as are absolutely necessary for the support of the property, and to keep it from waste and damage.

³ *Mickles v. Dillaye*, 17 N. Y. (3 Smith) 80; *Neale v. Hagthorp*, 3 Bland, 590; *McConnel v. Holobush*, 11 Ill. 61; *Thorne v. Newman*, Cas. Tem. Finch, 38.

⁴ *Bradley v. Snyder*, 14 Ill. 263.

⁵ *Reed v. Reed*, 10 Pick. 400; *Saunders v. Frost*, 5 Pick, 259, 270; *Cazenove v. Cutler*, 4 Metcalf, 246, 250.

⁶ *Saunders v. Frost*, 5 Pick. 259.

⁷ 5 Gray, 423.

trees, he might be allowed, upon a bill to redeem, the expenses, beyond what was received for rent, necessary to keep it in such repair; but that he could not be allowed for money paid for a horse and cart, cow and farming utensils, and other expenditures in cultivating the land.

In *Cazenove v. Cutler*,¹ it was held that disbursements made by a mortgagee in possession, to which the mortgagor or his assignee, with a knowledge or means of knowledge of the facts and circumstances, agrees and consents, are to be deemed reasonable, and must be reimbursed.²

Where the mortgage was of mines, and the mortgagee was in possession of them, with the right to work the same, and had expended large sums in so doing, he was held entitled to recover not only the sums expended, but also interest on them.³

There has been considerable diversity of opinion, in different Courts, on the question, whether the mortgagee is entitled to charge for beneficial and lasting improvements. The clearing of uncultivated land, though an improvement, was not allowed for in *Moore v. Cable*,⁴ on account of additional difficulties it would throw in the way of the ability of the debtor to redeem.⁵ But the value of lasting improvements has sometimes been allowed, in England, under peculiar circumstances.⁶ In the United States, expenditures for such improvements have sometimes been allowed, and at other times disallowed. In *Gordon v. Lewis*,⁷ Story J. said: "The mortgagee may entitle himself, under circumstances, to compensation for all lasting improvements upon the premises." An allowance for permanent improvements was directed

¹ 4 Metcalf, 246.

² See *Montgomery v. Chadwick*, 7 Clarke (Iowa) 114.

³ *Norton v. Cooper*, 39 Eng. L. & Eq. 130. Mortgagee, who opened a slate quarry, was not allowed the expenses incurred. *Hughes v. Williams*, 12 Vesey, 493. In *Thorneycroft v. Crockett*, 16 Sim. 445, a mortgagee in possession opening and working mines, was charged with receipts and disallowed expenses.

⁴ 1 John. Ch. 385. See *Givens v. M'Calmont*, 4 Watts, 460.

⁵ "In some cases the Court will relieve where the mortgagee will suddenly bestow unnecessary costs upon the mortgaged lands, on purpose to clog the lands to prevent the mortgagor's redemption." Viner's Abr. Tit. Mortgages, X. 1, citing a case from Tothill, 231; Hoff. Mast. in Chan. 248.

⁶ *Exton v. Greaves*, 1 Vern. 138; *Talbot v. Braddill*, 1 Vern. 183, note; 3 Powell on Mort. (Rand's ed.) 956, n. (2); *Quarrell v. Beckford*, 14 Vesey, 177; S. C. 1 Mad. 273; *Webb v. York*, 2 Scho. & Lef. 676.

⁷ 2 Sumner, 155.

in *Conway v. Alexander*,¹ and so in other cases,² but no uniform rule has been established.

In Massachusetts, the statute³ provides that allowance shall be made to the mortgagee "for all sums expended in reasonable repairs and improvements." Under this provision, expenditures for improvements are allowed to the mortgagee only so far as they appear to be beneficial to the estate.⁴ The allowance of sums expended by the mortgagee in necessary repairs and improvement of the mortgaged premises cannot be objected to on the ground that those sums exceed the amount of the rents and profits.⁵ If the mortgagor seek to deprive the mortgagee of the usual allowance for necessary repairs and lasting improvements, on the ground

¹ 7 Cranch, 218.

² *Bollinger v. Chouteau*, 20 Missouri, 89; *Ford v. Philpot*, 5 Harr. & J. 312. See *Norton v. Cooper*, 39 Eng. Law & Eq. 130; *Givens v. McCalmont*, 4 Watts, 463; *McCarron v. Cassidy*, 18 Ark. 34; *Mickles v. Dillaye*, 17 N. Y. (3 Smith,) 80; *McConnel v. Holobush*, 11 Ill. 61.

³ Genl. Sts. c. 140, s. 15. See *Woodward v. Phillips*, 14 Gray, 132.

⁴ *Adams v. Brown*, 7 Cush. 220, 221, 222; *Tucker v. Buffum*, 16 Pick. 46; *Boston Iron Co. v. King*, 2 Cush. 400, 405. In this last case, Wilde J. said, "The Master reports, that the improvements made on the estate, according to the evidence, appeared to him necessary and permanent, and that the cost, according to the evidence, was not allowed in full, but only so much as, in the opinion of the Master, the improvements would have cost an experienced and judicious farmer. We think these allowances were made on a correct principle. 'The true rule,' as it is laid down in the case of *Reed v. Reed*, 10 Pick. 400, 'undoubtedly is, that the mortgagor shall be charged no more of the cost than that which is beneficial to the estate.' As we understand the report, the allowances were made in conformity with this rule, although it is not so expressed in terms." The same rule was acted on in *Adams v. Brown*, *supra*. This rule gives to the mortgagee in making improvements no credit for honest effort, *bona fide* purpose, or the conduct of a prudent owner. If he undertakes to make any improvements, it must be done at his own risk, that they shall be beneficial. In *Woodward v. Phillips*, 14 Gray, 132, it was held, that the mortgagee in possession is entitled to be allowed, upon redemption, his necessary expenses for keeping the estate in repair, but not expenditures for convenience or ornament. In this case the Master found as follows, viz., "for reasonable repairs and improvements, \$205.22 was expended, and I am satisfied that the said premises were increased in value that sum." But he also found, upon certain principles stated by him, that the plaintiff was entitled to redeem the premises upon the payment of \$124.52 to the defendant. The Court decided that the amount allowed to the mortgagee should be limited to \$124.52 for "necessary expenses," according to the report of the Master. In this case no allowance was made for improvements, though found to be beneficial in increasing the value of the estate.

⁵ *Reed v. Reed*, 10 Pick. 398; *Mickles v. Dillaye*, 17 N. Y. (3 Smith,) 80.

that they were not necessary, he must make a case in his bill, otherwise the decree will be in the usual form.¹

The mortgagee in possession will be allowed for sums expended by him in fines for the renewal of leases;² and interest on the money advanced, at the rate his mortgage carries.³ So for sums expended in redemption of land tax, if the mortgagor elects to take it.⁴ So sums expended by him in supporting the title of the mortgagor to the estate,⁵ or for discharging prior incumbrances;⁶ so the extra costs of defending the mortgagor's title at law;⁷ so the costs of procuring administration to the mortgagor.⁸ And on redemption by a second mortgagee, the original mortgagee will be allowed extra costs incurred by him in foreclosing the mortgagor.⁹

The mortgagee may charge for sums paid by him for taxes upon the premises, and also for assessments which he has been obliged to pay in order to preserve the security; and in the case of taxes the mortgagee may presume them to have been legally assessed, and may therefore pay them, without inquiring into their validity, unless notified by the mortgagor of their invalidity, and indemnified against hazard of losing the estate by omitting to pay them.¹⁰

If the land be lost by failure to pay the tax upon it, the mortgagee is not chargeable with the loss.¹¹

¹ *Powell v. Trotter*, 1 Dr. & S. 388.

² *Manlove v. Ball*, 2 Vern. 84; *Lacon v. Mertins*, 3 Atk. 4; *Hamilton v. Denny*, 1 Ball & B. 202; *Clark v. Smith*, Saxton Ch. (N. J.) 122.

³ *Woolly v. Drag*, 2 Anstr. 551.

⁴ *Knowles v. Chapman*, Seton Dec. (Am. ed. 1831) 151.

⁵ *Godfrey v. Watson*, 3 Atk. 518; *Powell Mortg.* 986, n; *Hagthorp v. Hook*, 1 Gill & J. 270; *Clark v. Smith*, Saxton Ch. (N. J.) 121; *Miller v. Whittier*, 36 Maine, 577; *McCumber v. Gilman*, 15 Ill. 381; *Riddle v. Bowman*, 7 Foster (N. H.) 236; 4 Kent (10th ed.) 193; *Brown v. Simons*, 44 N. Hamp. 477, 478.

⁶ *Page v. Foster*, 7 N. Hamp. 392; *Miller v. Whittier*, 36 Maine, 577; *Silver Lake Bank v. North*, 4 John. Ch. 370; *Marine, &c. v. Biayes*, 4 Har. & J. 343; *Arnold v. Foot*, 7 B. Mon. 66.

⁷ *Ramsden v. Langley*, 2 Vern. 536.

⁸ *Ramsden v. Langley*, *supra*.

⁹ *Lomax v. Hyde*, 2 Vern. 185. See *Gage v. Brewster*, 30 Barb. (N. Y.) 387.

¹⁰ *Williams v. Hilton*, 35 Maine, 547; *Mix v. Hotchkiss*, 14 Conn. 32; *Faure v. Winans*, Hopk. Ch. 283; *Kortright v. Cady*, 23 Barb. (N. Y.) 290; *Bollinger v. Chouteau*, 20 Missou. 89; *Eagle Ins. Co. v. Pell*, 2 Edw. Ch. 631; *Clark v. Smith*, Saxton Ch. (N. J.) 122. See *Veach v. Schaup*, 3 Clarke (Iowa) 194.

¹¹ *Harvie v. Banks*, 1 Rand. 408; *Williams v. Hilton*, 35 Maine, 547.

Where it was a condition of the mortgage that the mortgagor should keep the premises insured in a certain sum for the benefit of the mortgagee, the mortgagee was allowed for premiums paid by him for such insurance, which the mortgagor had not obtained, although the insurance obtained by the mortgagee was "for whom it may concern," and payable to the mortgagee.¹ But where there is no provision made for insurance in the mortgage, the mortgagee is not allowed to charge for insurance effected by him on the mortgaged premises.²

Compensation to Mortgagee for his Trouble, &c.

In England, a mortgagee is not entitled to make any charge, by way of commission, for his own personal services and trouble in managing the property, and collecting and receiving the rents, while in possession, but he may charge for the expenses of a bailiff or receiver, when it becomes proper to employ one.³ The same rule has been followed in some of the United States;⁴ while in Massachusetts and some other States an allowance will be made to the mortgagee for his personal services in the management of the estate, collecting the rents, &c.⁵ But if the mortgagee actually occupies the estate himself, he can claim no allowance for his care and trouble.⁶

¹ *Fowley v. Palmer*, 5 Gray, 549; *Mix v. Hotchkiss*, 14 Conn. 32.

² *Saunders v. Frost*, 5 Pick. 259; *King v. State Mut. Fire Ins. Co.* 7 Cushing, 1, 8; *White v. Brown*, 2 Cushing, 412; *Dobson v. Land*, 8 Hare, 216; S. C. 13 Law Rep. 247; *Clark v. Smith*, Saxton Ch. (N. J.) 121.

³ *Bonithon v. Hockmore*, 1 Vern. 316; *French v. Baron*, 2 Atk. 120; *Godfrey v. Watson*, 3 Atk. 517; *Langstaffe v. Fenwick*, 10 Vesey, 405; *Davis v. Dendey*, 3 Madd. Ch. R. 170; *Clark v. Robbins*, 6 Dana (Ken.) 350; 4 Kent (10th ed.) 193; *McConnel v. Holobush*, 11 Ill. 61; *Gilbert v. Dyneley*, 3 Mann. & Gr. 12.

⁴ *Breckenridge v. Brooks*, 2 Marsh. (Ken.) 339; *Moore v. Cable*, 1 John. Ch. 385, 388; *Benham v. Rowe*, 2 Cali. 387.

⁵ In *Gibson v. Crehore*, 5 Pick. 161, and *Tucker v. Buffum*, 16 Pick. 46, a commission of five per cent on the rents received was allowed. In *Adams v. Brown*, 7 Cushing, 220, 222, 223, it was said, that "each case in this respect must depend upon its own peculiar circumstances. In many cases, a commission of five per cent on the rents received would be wholly inadequate," and the Master was directed to allow such further sum as he might think just and reasonable. See *Cazenove v. Cutler*, 4 Metcalf, 246, 250; *Waterman v. Curtis*, 26 Conn. 241; *Granberry v. Granberry*, 1 Wash. (Va.) 246; *Wilson v. Wilson*, 3 Binn. 557.

⁶ *Eaton v. Simonds*, 14 Pick. 105. In this case, Wilde J. said, "The rule is, that a mortgagee in possession, who manages the estate himself, is not to be allowed for his own care and trouble; otherwise, if he employs a bailiff, or lets the estate to a tenant, and so is the rule in England."

As to the Mode of Stating the Account.

Where the assignee of a mortgage, made to secure payment of a note for \$700 in two years, with interest semi-annually, took possession of the mortgaged premises, under a judgment, after the expiration of the two years, and received rents and profits, and it appeared upon a bill in equity to redeem and upon a report of the Master, which did not make annual rests, that the net annual rents would exceed the year's interest on the note, the Court directed that annual rests should be made, and that the Master should (1) state the gross rents, received by the defendant, to the end of the first year, (2) state the sums paid by him for repairs, taxes, and a commission for collecting the rents, and deduct the same from the gross rents, and the balance will show the net rents to the end of the year, (3) compute the interest on the note for one year, and add it to the principal, and the aggregate will show the amount due thereon to the end of the year. (4) If the net annual rent exceeds the year's interest on the note, (as it will,) deduct that rent from the amount due, and the balance will show the amount remaining due at the end of the year. (5) At the end of the second year, go through the same process, taking the amount due at the beginning of the year as the new principal to compute the year's interest upon; and so on to the time of judgment.¹

The amount is to be made up to the time of the Master's report.² But the mortgagee must account for the rents and profits subsequent to the decree of foreclosure, where he is in possession, and the premises are redeemed within the time allowed by the decree.³ The remedy is, however, wholly in equity and not at law.⁴

Effect of Master's Report upon Mortgagee's Account of Rents, Profits, Expenditures, &c.

All questions and inferences of fact involved in the account of the mortgagee are peculiarly fit for the consideration of the

¹ Van Vronker v. Eastman, 7 Metcalf, 163, per Shaw C. J.

² Holabird v. Burr, 17 Conn. 556; Smith v. Brush, 11 Conn. 366; Adams v. Brown, 7 Cush. 223, 224; Mann v. Richardson, 21 Pick. 355; Stewart v. Clark, 11 Metcalf, 384.

³ Ruckman v. Astor, 9 Paige, 518; ante, 1014.

⁴ Chapman v. Smith, 9 Vermont, 153.

Master, and, if he adopts the correct principle in point of law, his report will be conclusive, unless it clearly appears from the report or otherwise that he has acted under a mistake, or has abused or exceeded his authority.¹ And the burden is on the excepting party, to establish the mistake or misconduct alleged.²

In *Mott v. Harrington*,³ it was held not to be proper for the Court, on exceptions to a Master's report, to review his proceedings in relation to an account, or the items thereof. Nor will the Master's decision on the evidence before him be reviewed on appeal.

Partnership Accounts.

A decree for a partnership account in its simplest form is to this effect: "Let an account be taken of all partnership dealings and transactions between the plaintiff and the defendant, from the — day of —. Just allowances —. And let what, upon taking the said account, shall be certified to be due from either of the said parties to the other of them, be paid by the party from whom to the party to whom the same shall be certified to be due. Liberty to apply."

The method of taking a partnership account under such a decree is: —

First, to ascertain how the firm stands in relation to third parties.

Second, to ascertain what each partner is entitled to charge in account with his copartners, remembering, in the words of Lord Hardwicke, that "each is entitled to be allowed as against the other, everything he has advanced or brought in as a partnership transaction, and to charge the other in account with what that other has not brought in, or has taken out more than he ought."⁴

Third, to apportion between the partners all profits to be divided or losses to be made good; and ascertain what, if anything, each

¹ *Sparhawk v. Wills*, 5 Gray, 423; *Adams v. Brown*, 7 Cushing, 220, 222; *Reed v. Reed*, 10 Pick. 398, 400; *Boston Iron Co. v. King*, 2 Cushing, 405, 406; *Howe v. Russell*, 36 Maine, 115; *McKinney v. Pierce*, 5 Ind. (Porter) 422; *Merriam v. Baxter*, 14 Vermont, 514; *Ashmead v. Colby*, 26 Conn. 289, 312, 313; *Holabird v. Burr*, 17 Conn. 563; *Izard v. Bodine*, 1 Stockt. (N. J.) 309; *Sinnickson v. Bruere*, 1 Stockt. (N. J.) 659.

² *Da Costa v. Da Costa*, 3 P. Wms. 140, note; *Howe v. Russell*, 36 Maine, 127.

³ 15 Vermont, 185. See *Van Vronker v. Eastman*, 7 Metcalf, 163.

⁴ *West v. Skip*, 1 Ves. Sen. 242.

partner must pay to the others, in order that all cross claims may be settled.

When a partnership account is decreed, it is not usual for the Court to determine beforehand what are, and what are not, just allowances. That is determined on taking the account, and if necessary the decree will direct a statement to be made of the facts and reasons upon which any allowances shall be adjudged to be just allowances.¹

The partnership books being accessible to all the partners, and being kept more or less under the charge of them all, are *prima facie* evidence against each of them, and therefore, also for any of them against the others; but subject to the right of either party to show errors or mistakes in the account.² But entries made by one partner without the knowledge of the other, do not, of course, prejudice the latter as between him and his copartner;³ and where a surviving partner drew up an account which he furnished to the executors of his late partner, it was held that such account was admissible against the partner who furnished it, and that the executors were not bound by using it against him, to admit its correctness throughout.⁴ Generally, it is sufficient to examine and state the books of the copartners, without requiring vouchers in support of each particular item.⁵

The decree for an account usually directs that all parties shall produce on oath, all books and papers in their custody relating to the taking of the accounts. If any partner has kept accounts relating to the partnership in private books of his own, he must produce such books.⁶ As between partners and their representatives material documents must be produced, though they may be privileged as between them and other persons.⁷ If a partner has

¹ See *Crawshay v. Collins*, 2 Russ. 347; *Brown v. De Tastet*, Jac. 294, 298, 299; *Cook v. Collingridge*, Jac. 623, 625; *Wedderburn v. Wedderburn*, 2 Keen, 753.

² *Lodge v. Prichard*, 3 De G., Mac. & G. 906; *Smith v. Chandos*, 2 Atk. 158; *Heartt v. Corning*, 3 Paige, 566; *Stoughton v. Lynch*, 2 John. Ch. 218.

³ *Hutcheson v. Smith*, 5 Irish Eq. 117.

⁴ *Morehouse v. Newton*, 3 De G. & Sm. 307.

⁵ *Fletcher v. Pollard*, 2 Hen. & Munf. 544; *Brickhouse v. Hunter*, 4 Hen. & Munf. 363; *Turner v. Hughes*, 1 Busbee Eq. (N. C.) 116; *Reed v. Jones*, 8 Wis. 421.

⁶ *Toulmin v. Copland*, 3 Y. & C. Ex. 655; *Freeman v. Fairlie*, 3 Mer. 43.

⁷ See *Brown v. Perkins*, 2 Hare, 540.

books or accounts in his possession, and will not produce them, an account may, nevertheless, be arrived at by presuming everything against him.¹

The Master in taking an account, does not, in general, strike any balance till the whole charge and discharge have been gone through, and he is not at liberty to make rests in the account, unless directed so to do by the decree.² It frequently happens, however, that, upon further directions, he is ordered to make yearly or half-yearly, or other rests; the object of which direction is, to enable the Court to see what balances the accounting party has, from time to time, retained in his hands, in order that it may

¹ *Walmsley v. Walmsley*, 3 Jo. & Lat. 556; and see *Gray v. Haig*, 20 Beav. 219.

² *Webber v. Hunt*, 1 Mad. 13; *Powell on Mort.* 958 *a*, *n.*; *Hoff. Mast. in Chan.* 244; *Davis v. May*, Coop. Rep. 238; *Yates v. Hambly*, 2 Atk. 362; *Donovan v. Fricker*, Jac. 168. "Courts of Equity will not, ordinarily, require annual rests to be made in settling accounts." 2 Story Eq. Jur. § 1016 *a*.

The direction to take the accounts of a mortgagee in possession with rests, is not of course, but a case must be made out, showing its propriety under the circumstances, and it is never directed for a broken period. *Davis v. May*, 19 Ves. 383; *Donovan v. Fricker*, Jac. 168; *Nasom v. Clarkson*, 4 Hare, 104. In *Davis v. May*, *supra*, Lord Eldon said, "From precedents of decrees that I have seen, I collect, that the usual course is not to give that direction." And in that case it was also held, that rests could not be directed from a particular period of the account. But in *Wilson v. Metcalf*, 1 Russ. 530, rests were directed from the time the mortgage appeared to have been paid off. See also *Shaeffer v. Chambers*, 2 Halst. Ch. (N. J.) 548. In *Boston Iron Co. v. King*, 2 Cushing, 400, where a mortgagee of real estate, who had been some time in the possession and occupation of the same, sold and conveyed the estate to a purchaser, who entered and took possession thereof, it was held, that, in stating an account on a bill in Equity to redeem, the Master could not properly make a rest in the computation of the interest, at the time of the assignment, and add the interest then due to the principal, even in favor of such purchaser who had paid the full amount of the mortgage debt and interest computed to the day of his purchase.

The interest never having been in arrears, and the rents having annually exceeded the amount of the interest, rests were directed in *Sheppard v. Elliott*, 4 Madd. Ch. R. 254.

In *Raphael v. Boehm*, 11 Vesey, 102, it is said, that every receipt forms a rest. But it seems that the usual direction is for annual rests. *Knowles v. Chapman*, Seton on Dec. (Am. ed. 1831) 112; *Yates v. Hambly*, *supra*; *Webber v. Hunt*, 1 Madd. Ch. R. 13; *Quarrell v. Beckford*, 14 Vesey, 177; S. C. 1 Madd. Ch. R. 273; *Robinson v. Cumming*, 2 Atk. 410. Rests will be allowed upon the amount of an occupation rent as well as upon rents and profits received. *Wilson v. Metcalf*, 1 Russ. 530.

judge whether he ought to be charged with interest on his balances or not;¹ and to apply the excess of the rents and profits beyond the interest, to the reduction of the principal.² Where, therefore, such a direction occurs in a decree, the course for the Master to pursue is, to strike a balance at each rest, which the decree requires him to make, by deducting the amount of the discharge from the amount of the charge up to that period.³

It sometimes happens that, in decrees directing accounts, the Court orders the Master, if he shall find that there are stated accounts, not to disturb the same; this direction is usually inserted

¹ *Hall v. Hallett*, 1 Cox, 138; *Raphael v. Boehm*, 11 Ves. 110.

² *Hoff. Mast. in Chan.* 243; *Gould v. Tancred*, 2 Atk. 533.

³ As to computing interest with rests, see post, 1259. Upon a bill to redeem against the assignee of a mortgage, where the rents and profits were considerable and the interest of the debt was payable semi-annually, it was decreed, that interest should be computed upon the rents and profits, making semi-annual rests. *Gibson v. Crehore*, 5 Pick. 160, 161. See *Reed v. Reed*, 10 Pick. 400. In a case, where it does not appear at what times the interest of the debt was payable, the Master was directed "to cast interest on the rents and profits, making proper rests"; and he cast interest accordingly, making annual rests; the Court held, that if any rests were proper, annual rests were undoubtedly to be made. *Gordon v. Lewis*, 2 Sumner, 146. It seems that the usual direction, when any is made, is for annual rests. *Seton Decrees* (Am. ed. 1831) 112; *Knowles v. Chapman*, ib.; *Yates v. Hambly*, 2 Atk. 362; *Webber v. Hunt*, 1 Madd. Ch. R. 13; *Van Vronker v. Eastman*, 7 Metcalf, 162, 163. A mortgagee in possession has a right to apply the rents and profits received by him first to satisfy the expenditures made by him in the proper management of the estate. If there be any excess, it should be applied to the payment of the interest on the mortgage debt. No case for rests arises unless there is an excess of rents and profits above the expenditures and interest. When such excess arises, it is to be applied to the reduction of the principal debt, and interest is afterwards to be computed on the balance of principal so reduced. Rests will not, ordinarily, be directed, when the effect of such direction might be to give interest on interest. See *Reed v. Reed*, 10 Pick. 398, 400, 401; *Gibson v. Crehore*, 5 Pick. 146; *Saunders v. Frost*, 5 Pick. 259, 270; *Shaeffer v. Chambers*, 2 Halst. Ch. (N. J.) 548; *Wilson v. Cluer*, 3 Beav. 136; *Horlock v. Smith*, 1 Coll. 287; *Finch v. Brown*, 3 Beav. 70; *Blackburn v. Warwick*, 2 Younge & Coll. 92. Rests are not directed, if there was an arrear of interest when the mortgagee took possession. *Nelson v. Booth*, 3 D. & J. 119. And in such case, in general, not till the whole debt is paid. *Wilson v. Cluer*, 3 Bea. 136. See *Latter v. Dashwood*, 6 Sim. 462. Annual rests were directed on the ground that the incumbrancer set up an adverse title as owner, where otherwise they would not have been, in *Incorporated Society v. Richards*, 1 D. & War. 258, 290. See *Montgomery v. Calland*, 14 Sim. 79; *Smith v. Pilkington*, 1 D. F. & J. 120.

where a settled account is insisted upon in the answer and proved;¹ where a settled account is insisted upon by the answer, but not proved, the order, not to disturb the accounts, will be accompanied by a direction that the plaintiff shall have liberty to surcharge and falsify.² A settled account must, in such cases, be established before the Master, in the same manner as before the Court. The method of proceeding, where liberty is given to surcharge and falsify an account, has been before pointed out.³

*Computation of Interest.*⁴

A direction to the Master to compute interest upon debts, legacies, &c., frequently forms part of the decree.⁵ In ordinary suits for the administration of assets, the direction is, that the Master shall compute interest on such of the testator's [or intestate's] debts as carry interest, after the rate the same respectively carry interest,⁶ and upon his legacies, from the time and after the rate directed by the testator's will;⁷ and where no time of payment or

¹ *Cole v. Cole*, cited 14 Ves. 579.

² *Kinsman v. Barker*, *ib.*

³ Ante, p. 996. See 1 Story Eq. Jur. § 524–529; *Matthews v. Walwyn*, 4 Sumner's Vesey, 118, and note (b); Story Eq. Pl. § 800; *Boyle v. Hardy*, 28 Mis. (7 Jones) 390.

⁴ Courts of Equity will not decree current interest, when it could not be recovered at law. *Stewart v. Wilson*, 5 Dana, 54. Interest is to be allowed upon money paid to the use of another by his request, from the time of payment. *Gibbs v. Bryant*, 1 Pick. 118; *Reed v. Rens. Glass. Manf. Co.* 3 Cowen, 436; *S. C.* 5 Cowen, 587; *Rector v. Mark*, 1 Miss. 288; *Barnard v. Bartholomew*, 22 Pick. 291; *Chitty Contracts* (10th Am. ed.) 714, note, and cases cited. As to the effect of custom and usage on the allowance of interest, see *Reab v. M'Allister*, 8 Wendell, 109; *Chitty Contracts* (10th Am. ed.) 720, note.

⁵ By Chancery Rule 107, in New York, on a reference to take and to state an account, the Master was at liberty to allow interest as should be just and equitable, without any special directions for that purpose; unless a contrary direction was contained in the order of reference.

⁶ Seton on Decrees, 51.

⁷ A legatee being entitled to a residuary bequest, which the executor was directed by the will to make productive, may claim compound interest, to be calculated, (the circumstances considered,) with biennial rests. *Smith v. Lamson*, 8 Dana, 73. As a general rule, a trustee, however, is chargeable with compound interest only in cases of gross delinquency. *Clarkson v. Depeyster*, 1 Hopk. 424. As, where the trustee refuses to account. *Myers v. Myers*, 2 M'Cord Ch. 214, 266. Or, where he has used the money for his own purposes. *Schieffelin v. Stewart*, 1 John. Ch. 620. Though in cases of the latter kind, it has been said, that the ground of this allowance is, the actual or presumed gain of the trustee, by

rate of interest is thereby directed, then after the rate of four per cent per annum, which is the ordinary rate of interest given by the Court upon legacies and portions, where no specific rate of interest is directed by the will,¹ from the end of one year after the testator's death.²

With respect to interest on specialty debts, no question can arise as to its computation, — the rate at which it is to be allowed upon such debts, generally appearing upon the deed or instrument by which the debt is created.

It is to be noticed, however, that, with respect to a debt due on bond, the rule is to calculate interest up to the amount of the penalty of the bond;³ the Master cannot go beyond the amount of the penalty⁴ unless the creditor claims upon two securities for the same sum, one of which is a bond with a penalty, and the other a mortgage; in which case the Master may calculate interest beyond the penalty of the bond. It appears also not to be im-

the use of the funds; and that where circumstances forbid the presumption of gain by him, it will not be allowed. *Ringgold v. Ringgold*, 1 Harr. & Gill, 11.

¹ *Guillam v. Holland*, 2 Atk. 343; *Wood v. Briant*, ib. 523.

² *Seton on Decrees*, 63; *Hammond v. Hammond*, 2 Bland, 306; *Jones v. Stockett*, 2 Bland, 409; *Birdsall v. Hewlett*, 1 Paige, 32; *Gillon v. Turnbull*, 1 McCord Ch. 148; *Ingraham v. Postell*, ib. 98; *Shobe v. Carr*, 3 Munf. 10; *Cogdell v. Cogdell*, 3 Desaus, 387; *Bitzer v. Hahn*, 14 Serg. & R. 238; *Crickett v. Dolby*, 3 Sumner's Ves. 10, note (a). Where legacies were given to children, and there was no other provision made for them, interest was allowed on the legacies from the testator's death. *Hite v. Hite*, 2 Rand. 409; *Sullivan v. Winthrop*, 1 Sumner, 14, 15; *Crickett v. Dolby*, 3 Sumner's Vesey, 10, note (a); 2 Williams's Executors and Adm. (2d Am. ed.) 1022, *et seq.*; *Eyre v. Golding*, 5 Binney, 475.

³ *Sharp v. Earl of Scarborough*, 3 Ves. 557.

⁴ *Tew v. Earl of Winterton*, 3 Bro. C. C. 489, Perkins's ed. note (a); 1 Ves. jr. 451, S. C. Sumner's ed. 452, note (2); *Knight v. Maclean*, 3 Bro. C. C. 496; *Clark v. Seton*, 6 Ves. 411; *Hughes v. Wynne*, 1 M. & K. 20. That interest may be computed beyond the penalty of a bond, see *Tew v. Winterton*, *ubi supra*; *Mower v. Kip*, 6 Paige, 89; *Judge of Probate v. Heydock*, 8 N. Hamp. 491; *Baker v. Morris*, 10 Leigh, 285; *Francis v. Wilson*, 1 Ry. & M. 105; *Lewis v. Dwight*, 10 Conn. 95; *Bank of U. States v. Magill*, 1 Paine C. C. 661. In *Harris v. Clap*, 1 Mass. 308, interest was given in the shape of damages, even as against a surety, although the principal and interest exceeded the penalty of the bond. See also *Pitts v. Tilden*, 2 Mass. 118, Rand's ed. note (b), page 119; *Atwell v. Fowles*, 1 Munf. 175; *Tenant v. Gray*, 5 Munf. 494; *Swedes v. Houghtaling*, 3 Caines, 48; *Potter v. Webb*, 6 Greenl. 14; *Bank of U. S. v. Magill*, 1 Paine's C. C. 669; *U. States v. Arnold*, 1 Gall. 348.

portant in such a case which instrument was executed first, the bond or the mortgage,¹ nor that the party charged executed as a surety only.²

The rule which limits the computation of the amount due upon a bond to the amount of the penalty, has been held to extend to a bond for securing the payment of an annuity, at least till the decision of the V. C. of England, in *Jeudwine v. Agate*;³ this was generally supposed to have been the result of the decision of Lord Loughborough in *Mackworth v. Thomas*,⁴ but in *Jeudwine v. Agate*, the Vice-Chancellor held that, in point of fact, there was no such decision in *Mackworth v. Thomas*; and the opinion expressed by his Honor, after looking into the cases, was, — “that whenever there is a distinct agreement that a thing shall be done, whether it be the conveyance of an estate, the relinquishment of a right, *the payment* of an annual sum, or the payment of a sum of indefinite amount, (as in the case of *Weinholt v. Logan*,⁵) there, notwithstanding the agreement appears in the form of a bond with a penalty, the Court will consider that the recital in the condition of the bond is evidence of the agreement and will not limit the relief it gives to the amount of the penalty.”⁶

It is to be observed, however, that although his Honor is represented to have stated, that there was no such decision in *Mackworth v. Thomas*, as that contended for in *Jeudwine v. Agate*, he appears to have meant simply, that the facts in that case were not the same as those in *Jeudwine v. Agate*; and he takes a distinction between right to retain the arrears of annuity claimed by an executor, in a suit for administration of assets instituted by a creditor, (which was the case in *Mackworth v. Thomas*), and a substantive right asserted by the executor himself, in a bill filed to enforce his right to relief out of the assets (which was the case in *Jeudwine v. Agate*); so that, in fact, notwithstanding the decision of his Honor in the latter case, the rule laid down, in *Mackworth v. Thomas*, may be considered as still the rule of the Court, in suits by creditors, for the administration of assets, where the

¹ *Clark v. Lord Abington*, 17 Ves. 106.

² *Ibid.*

³ 3 Sim. 129.

⁴ 5 Ves. 329, Sumner's ed. 331, Perkins's note (a).

⁵ 1 Clk. & Fin. 611.

⁶ 3 Sim. 140.

claim to the arrears of the annuity is made on behalf of the personal representative against whom the bill has been filed, though it is otherwise where a suit is instituted by the annuitant himself.

Whilst we are upon this subject it is right to mention that, till recent enactments, it was held that in suits for the administration of assets no interest was to be computed upon the judgment, unless either an action at law had been brought upon the judgment, to recover interest in the shape of damages,¹ or a bill had been filed for the purpose of obtaining the benefit of the judgment in Equity.² Now, however, all difficulty as to allowing interest upon judgment has been taken away by the Act "for Abolishing imprisonment for debt upon mesne process,"³ by which it is enacted, "that every judgment debt shall carry interest, at the rate of 4*l. per centum, per annum*, from the time of entering up the judgment, or from the time of the commencement of the Act, (in cases

¹ Gaunt *v.* Taylor, 3 M. & K. 302.

² Hyde *v.* Price, 8 Sim. 578. See Lewes *v.* Morgan, 3 Younge & J. 394. See upon the point of interest on judgments, Chitty Contracts (10th Am. ed.) 716 and note, and cases cited; Creuze *v.* Hunter, 2 Sumner's Vesey, 157, note (c), and cases cited; Hodgden *v.* Hodgden, 2 N. Hamp. 169; Sayer *v.* Austin, 3 Wendell, 496; Mahurin *v.* Bickford, 6 N. Hamp. 567. Interest has been held recoverable on a judgment in many cases. See Fitzgerald *v.* Caldwell, 4 Dall. 251; Houston *v.* Mossman, Charl. 138; Norwood *v.* Manning, 2 Nott & M'C. 395; Fishburn *v.* Sanders, 1 Nott & M'C. 242; Gwinn *v.* Whitaker, 1 Harr. & J. 754; Fries *v.* Watson, 5 Serg. & R. 220; Berryhill *v.* Wells, 5 Binn. 56; Walker *v.* Kendall, Hardin, 404; Mason *v.* Eakle, Breese, 52; Smith *v.* Vanderhurst, 1 M'Cord, 328; Watson *v.* Fuller, 6 John. 284; Winslow *v.* Ancram, 1 M'Cord Ch. 104; Stafford *v.* Mott, 3 Paige, 100; Klock *v.* Robinson, 22 Wendell, 157; 2 Smith Ch. Pr. (2d Am. ed.) 305, note (6). A judgment carries only such rate of interest as is legal at the time of the judgment, whatever rate was recoverable on the contract on which the judgment was rendered. Verree *v.* Hughes, 6 Halst. 91; Mason *v.* Eakle, Breese, 52. Interest can be collected on a judgment only in those cases where the original cause of action bore interest. Thomas *v.* Wilson, 3 M'Cord, 166. It is not allowed on a judgment in an action sounding in damages. Daub *v.* Martin, 2 Bay, 193. See Smith *v.* Todd, 3 J. J. Marsh. 306; Marshall *v.* Dudley, 4 J. J. Marsh. 244; Younge *v.* Pate, 3 J. J. Marsh. 100. But it seems interest may be recovered in such case by way of damages, for the detention of the debt, in an action of debt, on the judgment. Stafford *v.* Mott, 3 Paige, 100. In determining the amount equitably due, where payments have been made upon successive executions under a judgment, they shall be first applied to the interest. Fay *v.* Bradley, 1 Pick. 194.

³ 1 & 2 Viet. c. 110, § 17.

of judgment then entered up, and not carrying interest,) until the same shall be satisfied.”¹

So that now, no action at Law, or suit in Equity, is necessary to enable a Master to compute interest on a judgment debt, but interest must be computed by the Master upon every sum of money due upon judgment, or upon a decree or order in Equity, &c.,² at the rate of 4 per cent from the entry of such judgment or decree, &c.

Formerly interest was allowed upon the arrears of an annuity, where they were secured by a bond with a penalty,³ or where the annuity was given for maintenance,⁴ or where it was left to a wife by her husband's will.⁵ It has also been allowed, where there have been great arrears,⁶ or where there has been an obstinate delay of payment,⁷ or where the annuitant has been compelled, by the delay, to borrow money at interest.⁸ The allowance of interest on such arrears was, however, always held to be discretionary in the Court; and in later cases, it has been refused notwithstanding the existence of circumstances which before induced the Court to allow it.⁹ In *Robinson v. Cumming*,¹⁰ Lord Hardwicke said, there was no instance where the Court had ever allowed arrears upon such an annuity, (viz., an annuity secured by grant, by way of mortgage, with power of entry in case of arrears,) unless, indeed, the annuitant had entered and been in possession of the estate charged with the annuity, in which case the Court would not have obliged him to have quitted the possession, unless the grantor had agreed to allow him interest for the arrears of his annuity down to the day. This seems to be consistent with the rule laid down

¹ Judgments carry interest by statute in Massachusetts. Genl. Sts. c. 133, § 8. So do awards, reports of auditors, or of Masters in Chancery, and verdicts of juries, carry interest from the time when made, to the time of making up judgment. *Ib.*

² The next section (18) enacts, that decrees and orders of Courts of Equity shall have the same effect as judgments at Law, ante, p. 1047.

³ *Newman v. Auling*, 3 Atk. 579.

⁴ *Ibid.*

⁵ *Litton v. Litton*, 1 P. Wms. 543; see also, *Draper's Company v. Davis*, 2 Atk. 211; *Irby v. M'Crea*, 4 Desaus. 422.

⁶ *Batten v. Earnley*, 2 P. Wms. 163.

⁷ *Stapleton v. Conway*, 1 Ves. 428.

⁸ *Anon.* 2 Ves. 661; *Bignal v. Brereton*, 1 Dick. 278.

⁹ See *Tew v. Earl of Winterton*, 1 Ves. jr. 451; 3 Bro. C. C. 489, S. C.; *Anderson v. Dwier*, 1 Sch. & Lef. 301.

¹⁰ 2 Atk. 411.

by Lord Talbot, in the *Countess of Ferrers v. Earl Ferrers*,¹ viz., that “arrears of an annuity or rent-charge are never decreed to be paid with interest, but where the sum is certain and fixed; and also where there is either a claim of entry, or *nomine pænæ*, or some penalty upon the grantor, which he must have undergone if the grantee had sued at Law, and which would have obliged him to come into this Court for relief, which the Court will not grant but upon equal terms, and those can be no other than decreeing the grantor to pay the arrears with interest.”

With respect to debts upon simple contract, and other debts which do not carry interest upon the face of them, it is now directed by the 46th Order of August, 1841, “That a creditor, whose debt does not carry interest, who shall come in and establish the same before the Master, under a decree or order in a suit, shall be entitled to interest upon his debt, at the rate of 4 per cent from the date of the decree, out of any assets which may remain after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest.”²

Under this order, a creditor is only entitled to interest from the date of the decree, and only out of such assets as remain after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest.

It may, therefore, in many cases, be important to determine whether a creditor is entitled to interest independent of this Order. In the investigation of this question, the Act of the 3 & 4 Will. IV. c. 42, s. 28, is important, by which it is enacted, “That upon all debts or sums of money payable at a certain time, or otherwise, the jury, on the trial of any issue, &c., may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest from the time when such debts or sums were payable, if such debts or sums of money be payable by virtue of some written instrument, at a certain time; or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice, to the

¹ Ca. Temp. Talb. 2.

² Interest may be allowed in Equity on all sums due and payable, or from the time when rests should be made in the accounts. The practice of the parties may be followed, or annual rests allowed. *Hollister v. Barkley*, 11 N. Hamp. 501. The period of the dissolution of a partnership is a proper time to make a rest, and interest is allowed on the balance. *Stoughton v. Lynch*, 2 John. Ch. 210; *Hollister v. Barkley*, 11 N. Hamp. 501, 512.

debtor, that interest will be claimed from the date of such demand until the time of payment in Equity.”

It may also be remarked, that it always was the practice in Equity, to allow interest to be computed upon promissory notes, and upon all other sums payable on demand, or on a day certain, upon which interest may, according to the practice of Courts of Law, be calculated either from the time of the demand made, or from the fixed period of payment.¹

It is to be remarked, that, where there has been a stated account between the parties, the balance appearing due on such account, will carry interest,² because, in such a case, it is held that there is an implied contract on the part of the debtor to pay, and all contracts to pay give a right to interest from the time when the principal ought to be paid.³ Such balance, however, must appear upon a regular statement of accounts; and to constitute such a statement, there must be a settlement or acknowledgment by *the*

¹ *Lowndes v. Collens*, 17 Ves. 27; *Upton v. Lord Ferrers*, 5 Ves. 803; *Parker v. Hutchinson*, *ubi supra*; *Chitty Bills* (12th Am. ed.) 759; *Chitty Contracts* (10th Am. ed.) 716, 717; *W. W. Story Contracts*, § 717; *Craven v. Tickell*, 1 Sumner's Ves. 63, note (1); *Ram on Assets*, ch. 39, § 1, § 2, p. 561, 571; *Van Giesen v. Van Houten*, 2 South. 822; *Francis v. Castleman*, 4 Bibb, 282; *Collier v. Gray*, 1 Overt. 110; *Cannon v. Beggs*, 1 M'Cord, 370; *Patrick v. Clay*, 4 Bibb, 246; *Bartlett v. Marshall*, 2 Bibb, 467; *Pollard v. Yoder*, 2 A. K. Marsh. 264; *Daggett v. Pratt*, 15 Mass. 677; *Gully v. Remy*, 1 Blackf. 69; *Schmidt v. Limehouse*, 2 Bailey, 276.

² *Barwell v. Parker*, 2 Ves. 363; *Vernon v. Cholmondeley*, Bunb. 119; see 2 Eq. Ca. Ab. 532, pl. 17, 20; *Blaney v. Hendricks*, 2 Blackst. Rep. 761; 3 Wils. 205, S. C. Interest was allowed on a stated account from the day it was signed. *Dickinson v. Legare*, 1 Desaus. 537. But interest will not be allowed on unliquidated demands, unless there is some precise time fixed for payment, an account rendered, a demand made, or some universal custom or usage to warrant it. See *Eckert v. Wilson*, 12 Serg. & Rawle, 393; *Graham v. Williams*, 16 Serg. & Rawle, 257; *Waggoner v. Grey*, 2 Hen. & Munf. 603; *M'Connico v. Curzen*, 2 Call. 358; *South v. Leavy*, Hard. 518; *Consequa v. Fanning*, 3 John. Ch. 601; *Kerr v. Love*, 1 Wash. 172; *Neal v. Keel*, 4 Monroe, 164; *Chitty Contracts* (10th Am. ed.) 717; *Roper v. Wren*, 6 Leigh, 38; *Craig v. Craig*, 1 Bailey Eq. 103; *Dennison v. Lee*, 6 Gill. & John. 383; *Hunt v. Nevers*, 15 Pick. 500; *Brewer v. Tyringham*, 12 Pick. 547; *Barnard v. Bartholomew*, 22 Pick. 291; *Dodge v. Perkins*, 9 Pick. 368; *Cole v. Trull*, 9 Pick. 325; *Raymond v. Isham*, 8 Vermont, 258; *Evarts v. Nason*, 11 Vermont, 122; *Marr v. Southwick*, 2 Porter, 351; 2 Smith Ch. Pr. (2d Am. ed.) 309, note (a), and cases cited.

³ *Boddam v. Riley*, 2 Bro. C. C. 2; 4 Bro. P. C. 561, 8vo ed.; see also, *Ex parte Furneaux*, 2 Cox, 219; and *Ex parte Champion*, 3 Bro. C. C. 436.

debtor, raising the contract to pay as the ground upon which alone interest will be given.¹

It may be mentioned here, as a general rule, that a charge of debts on real estate does not entitle simple contract creditors to interest.² In *Barwell v. Parker*, Lord Hardwicke is reported to have said, that if a man, in his life, creates a trust for the payment of debts, annexes a schedule of some debts, and creates a trust term for the payment, as that is in the nature of a specialty, that will make them, though simple contract debts, carry interest.³

It seems, however, that in order to effect this, the deed must have been executed by the simple contract creditors, and that they must have given up the right to sue the debtor upon his debt, otherwise there would be nothing to show that they had contracted for a specialty, by taking a security upon the land, and discharging the person of their debtor.⁴

It may be mentioned here, that in *Shirt v. Westby*,⁵ a charge, by will, on real estate of the simple contract debts of another person was considered as a legacy, and interest was ordered to be computed on such debts at the rate of four per cent.

With respect to the rate at which interest is to be computed, the usual rate of interest allowed in this Court, upon legacies and portions, is, as has been stated,⁶ four per cent, and the same rate of interest is given by the 1 & 2 Vict. c. 110, s. 17, upon judgments and moneys ordered to be paid by the decrees or orders of this Court, &c. In *Upton v. Lord Ferrers*,⁷ interest on a promissory note was ordered to be computed at five per cent. In *Parker v. Hutchinson*,⁸ interest on a similar security, was computed at four per cent.

In calculating interest, under a decree, the Master usually calculates it up to the date of his report; but it generally forms part

¹ Ibid.

² *Barwell v. Parker*, 2 Ves. 363; *Earl of Bath v. Earl of Bradford*, ib. 588; *Lloyd v. Williams*, 2 Atk. 109; *Hamilton v. Houghton*, 2 Bli. 186; *Shirley v. Earl Ferrers*, cited ib.; see contra, *Maxwell v. Wettenhall*, 2 P. Wms. 26.

³ *Barwell v. Parker*, *ubi supra*; *Stewart v. Noble*, Vern. & Scriv. 528, 537.

⁴ *Hamilton v. Houghton*, 2 Bli. 186.

⁵ 16 Ves. 393.

⁶ Ante, p. 1252.

⁷ 5 Ves. 803.

⁸ 3 Ves. 135.

of the decree upon further directions, that the Master shall compute subsequent interest on the debts mentioned in his report, on which he has computed interest.¹

It is to be observed, that in computing subsequent interest on the debts which carry interest, although it was formerly held that interest, when computed by the Master, became principal, and would carry interest;² the rule now is, not to compute interest upon interest reported to be due, even in the case of a mortgage,³ though the practice formerly was, to consider the interest as principal, from the date of the Master's report,⁴ the ground of which practice was, that the party came for the favor of the Court; he was ordered to pay a given sum on a certain day, and if he did not, he was put under terms of paying what would indemnify the other party completely.⁵

When the Master is ordered to compute interest with rests, the object of the Court is to charge the accounting party with compound interest.⁶ It appears, however, that formerly a difference

¹ Seton on Decrees, 58.

² See *Bacon v. Clerk*, 1 P. Wms. 480.

³ *Whatton v. Craddock*, 1 Keen, 26. The general rule is, that compound interest is not allowed. *Dunshee v. Parmelee*, 19 Vermont, 172; *Kittredge v. McLaughlin*, 38 Maine, 513; *Doe v. Warren*, 7 Greenl. 48; *Barrell v. Joy*, 16 Mass. 227; *Reed v. Reed*, 10 Pick. 400, 401.

⁴ *Turner v. Turner*, 1 J. & W. 47; *Perkins v. Baynton*, 1 Bro. C. C. 574; and see *Brown v. Barkham*, 1 P. Wms. 653; *Butler v. Duncumb*, 1 P. Wms. 453; *Astley v. Powis*, 1 Ves. 496; and *Creuze v. Hunter*, *ubi supra*. See *Hunn v. Norton*, Hopk. 344; *Dunbar v. Woodcock*, 10 Leigh, 629.

⁵ *Turner v. Turner*, *ubi supra*.

⁶ See *Hollister v. Barkley*, 11 N. Hamp. 501, 511, 512; ante, 1250, note; *Gibson v. Crehore*, 5 Pick. 160, 161; *Reed v. Reed*, 10 Pick. 400, 401; *Marr v. Southwick*, 2 Porter, 351; *Myers v. Myers*, 2 M'Cord Ch. 214, 266. Compound interest is not illegal, and may be recovered on an express promise, or one implied by law as part of the contract. *Bainbridge v. Wilcocks*, 1 Baldwin, 538; *Chitty Contracts*, (10th Am. ed.) 718, note, and cases cited; *Champion, ex parte*, 3 Bro. C. C. (Perkins's ed.) 440, note (b), and cases cited; *Ringgold v. Ringgold*, 1 Har. & Gill. 11; *Breckenridge v. Brooks*, 2 A. K. Marsh. 335, 399; *Armstrong v. Campbell*, 3 Yerger, 201; *Kennon v. Dickins*, Cam. & Nor. 357. An agreement to pay interest on interest, which has already become due, is not usurious. *Mowry v. Bishop*, 5 Paige, 98; *Camp v. Bates*, 11 Conn. 487, and other cases cited in note (b), to *Champion, ex parte*, 3 Bro. C. C. (Perkins's ed.) 440. The taking of compound interest is not usury. *Otis v. Lindsay*, 1 Fairf. 315. If compound interest is voluntarily paid by the debtor, it cannot be recovered back. *Mowry v. Bishop*, 5 Paige, 98; *Camp v. Bates*, 11 Conn. 487; *Barker v. Gregory*, 7 B. Mon. 439. A note made payable with interest annually does not entitle the

of practice prevailed amongst the Masters upon this point, and that some of them, at the time of the rests, carried the interest to a separate column, and computed subsequent interest on the principal only, and thus charged the party with simple interest only; the proper course, however, is, to add the interest to the principal, at the time of the rest, and to compute interest upon the aggregate sum.¹

It may here be remarked, that in the recent case of *Bower v. Main*,² where one of two obligors in a joint and several bond had become bankrupt, and the obligee had, by several dividends in the bankruptcy, been paid the principal and interest due at the date of the commission, Lord Cottenham held, that the obligee was still entitled to claim, in respect of the same bond, in an administration suit against the estate of the co-obligor, and that the amount due to the obligee in respect of such claim was to be computed by treating the dividends as ordinary payments on account; that is, by applying each dividend in the first place to the payment of the interest due at the date of such dividend, and the surplus, if any, in reduction of the principal.³

holder to compound interest. *Doe v. Warren*, 7 Greenl. 48; *Hastings v. Wiswall*, 8 Mass. 455; *Chitty Contracts* (10th Am. ed.) 718, note. Original contracts for annual compound interest have been held oppressive and invalid. *Rodes v. Blythe*, 2 B. Monroe, 336. See *Connecticut v. Jackson*, 1 John. Ch. 13; *Van Benschooten v. Lawson*, 6 John. Ch. 313; *Childers v. Deane*, 4 Rand. 408; *Mowry v. Bishop*, 5 Paige, 98. In *Breckenridge v. Brooks*, 2 A. K. Marsh. 335, 339, it was held that compound interest was not forbidden by the statute of usury, but it is to be regarded as iniquitous, and is not to be decreed in Chancery, though agreed to by the parties. A special case must always be made out for the allowance of compound interest. *Armstrong v. Campbell*, 3 Yerger, 201; *Connecticut v. Jackson*, 1 John. Ch. 13; *Darrel v. Eden*, 3 Desaus. 241; *Mowry v. Bishop*, 5 Paige, 98; *Ringgold v. Ringgold*, 1 Harr. & Gill. 11; *Myers v. Myers*, 2 M'Cord Ch. 214, 266; *Van Benschooten v. Lawson*, 6 John. Ch. 313; 2 Story's Eq. Jur. § 1277.

¹ *Raphael v. Boehm*, 11 Ves. 97, 103.

² Cr. & Ph. 351.

³ As to the rule for computing interest when partial payments have been made, see *Chitty Contracts* (10th Am. ed.) 720, note, and cases cited; *Connecticut v. Jackson*, 1 John. Ch. 17, 18; *Dean v. Williams*, 17 Mass. 417; *Scanlan v. Houston*, 5 Yerger, 310; *Harvey v. Crawford*, 2 Blackf. 43; *Black v. Blakely*, 2 M'Cord Ch. 10; *Wright v. Wright*, 2 M'Cord Ch. 204; *Lightfoot v. Price*, 4 Hen. & Munf. 431; *Williams v. Houghtaling*, 3 Cowen, 87, note (a). By the law of what place the rate of interest is determined, see *Bailey on Bills* (2d Am. ed.) 79, 82, 378; *Bailey v. Leal*, 1 Harring. 232; *Hosford v. Nichols*, 1 Paige, 225; *Story Conf. Laws* (2d ed.) 241 to 243, and notes.

Settlement of Deeds, &c.

Amongst the ministerial acts which the Master is most frequently called upon to perform, may be enumerated the settlement of conveyances or other deeds, the appointment of trustees, and the superintendence of sales ordered to take place before him; to which may be added the appointment of receivers, and of guardians of infants, and of the allowances for their maintenance, &c.; but which, as being more generally directed upon interlocutory applications, will be reserved for future consideration.

When a conveyance, or other deed, is ordered to be executed, it usually forms part of the order directing it, that it shall be settled by the Master, in case the parties differ about the same.

The course of proceeding under such a direction is pointed out by the 76th of the Orders of 1828, which provides that where a Master is directed to settle a conveyance, in case the parties differ about the same, then the party entitled to prepare the conveyance shall bring the draft of the conveyance into the Master's office, and give notice of his having so done to the other party. This notice may be given by serving the usual warrant "on leaving";¹ after which the other party is at liberty, within eight days, to inspect the same without fee, and to take a copy thereof, if he thinks proper.

If the party is not prepared, or likely to be prepared, at the end of the eight days, to adopt the conveyance, or to state his objections to it, he should apply to the Master for further time, which the Master is, by the above Order, empowered to grant at his discretion.

If he does not obtain an extension of time, he must, at or before the expiration of the eight days, (or having obtained such extension, at or before the expiration of such further time as the Master in his discretion shall allow,) either adopt the conveyance or signify his dissent therefrom, which he must do by delivering a statement, in writing, of the alterations which he proposes to make in the draft of the conveyance, serving, at the same time, a warrant "on leaving."

If the party does not signify his dissent, or deliver a statement, in writing, of his proposed alterations, within the eight days, or such further time as the Master may have appointed for that

¹ Ante, p. 1146.

purpose, the Master, at the expiration of the eight days, or the further time which he has appointed, may proceed to settle the conveyance according to the practice of the Court, which he must also do where a statement of proposed alterations has been delivered, and the party bringing in the draft refuses to accede to them.

It is to be observed, that, by the 76th Order it is directed, that, in case the Master shall adopt the proposed alterations in the draft of conveyance, then the costs of the proceeding in respect of the conveyance shall be borne by the other party.

The rule as to settling conveyances, under the decree of this Court, is thus stated by Lord Hardwicke — “Where conveyances are to be made by a decree of this Court, the settling them, to be sure, is to be, by the like kind of rule, as men of judgment among the conveyancers would direct.”¹ This being the rule, the Court sanctions the practice, generally resorted to by the Masters, before settling a conveyance, of directing the draft to be laid before a conveyancer to advise upon it,² in which case the same course of proceeding must be adopted as when he directs an abstract to be laid before a conveyancer.³

When the Master has settled the draft of the conveyance, an engrossment of it will be made in the Master's office, and the Master will signify his allowance of it by signing his name in the first and last skins, and also his allocation in the last skin, in the following form, in the margin of the engrossment: — “*A. v. B. I approve of and allow this indenture, being the same mentioned in my report, dated the — day of —.*” He then signs a report or certificate of his having approved and allowed the engrossment, which must be filed in the usual manner.⁴ But no warrants on preparing, or to sign certificate, are taken out, nor is any order necessary to confirm it.⁵

The conveyance, having been approved of by the Master, must be executed by the parties; and, if anything is required to be done by the Court, or by the Accountant-General, on the execution of the conveyance, an affidavit of such execution must be

¹ Lloyd v. Griffith, 3 Atk. 264.

² Turn. & V. 421; see 3 Atk. 266.

³ Ante, p. 1212.

⁴ 1 Turn. & V. 422.

⁵ Ibid.

made, and on such affidavit the Master will issue his certificate, which is filed in the usual manner.¹

Exceptions lie to the Master's certificate of having settled a conveyance,² and in *Lloyd v. Griffith*,³ the Court directed the Master forthwith to make his certificate or report of his approbation of the draft of a conveyance, which he was to settle, in order that the party might except thereto.

Appointment of New Trustees.

When it is referred to the Master to appoint new trustees, in the room of trustees who are dead or decline to act, &c., the course to be pursued is, for the party obtaining the reference, to leave, in the Master's office, a state of facts and proposal, stating the nature of the property, the interest of the parties, &c., and proposing the parties who were to be the new trustees. In support of this state of facts, an affidavit of the eligibility of the new trustees is necessary; and it seems that sometimes the Master requires the production of the acceptance, in writing, of the trust by the new trustees.⁴ Warrants on leaving, and to proceed, &c., having been served, if the proposal is satisfactory, the Master prepares and signs his report appointing the new trustees. This report is filed, and may be excepted to in the same manner as other reports of a similar nature, but, upon hearing the exceptions, the Court will not enter into the comparative merits of the several persons who have been proposed by the different parties.⁵ It frequently happens that the order directing the appointment of new trustees directs a conveyance of the trust estates to such new trustees, to be executed, and orders the Master to settle such conveyance. When this is the case, after the Master has made his report of the appointment of the new trustees, the proper conveyances for vesting the estate in such new trustees are prepared, and brought into the Master's office, and proceeded upon, in the same manner as other deeds.⁶

It may be mentioned, with reference to this subject, that in the

¹ 2 Smith, 195.

² *Wakeman v. Duchess of Rutland*, 3 Ves. 504; *Lloyd v. Griffith*, 3 Atk. 264.

³ 1 Dick. 103; and *Huggins v. York Buildings' Company*, cited *ib.*

⁴ 2 Smith, 374, 3d edit.

⁵ *Attorney-General v. Dyson*, 2 S. & S. 528.

⁶ Ante, pp. 1261, 1262.

conveyance to new trustees, the Court will not insert a clause to enable the new trustees to appoint others in their stead, unless there is a provision to that effect in the original instrument by which the trust is created ;¹ and that when the original deed does contain such a clause, the Court will not, on the application of the trustees themselves, appoint new trustees, without a reference to the Master ;² the rule of the Court being, that when persons are authorized to choose, if they will not exercise the power without coming to the Court, there must be a reference.³

Sales of Property.

Where an estate, or other property, is directed to be sold to the best bidder, with the approbation of the Master, it must be sold by public auction, unless the Court specially directs that a different method of disposing of the property shall be adopted, which it will sometimes do, under circumstances which will be hereafter pointed out.⁴

A sale under the direction of the Court is generally conducted by the solicitor for the plaintiff, and he is, in all questions which may arise between the purchaser and the vendor, to be considered as the agent of all the parties to the suit.⁵

In strictness, all sales ought to take place in the public room at the Master's office in London, and should be effected by the Master's clerk ;⁶ and formerly it was considered for the benefit of the parties interested that the estate should be sold in the country, or if by any other person than the Master's clerk, it was necessary to have a special order of the Court, to warrant such a deviation from the ordinary practice ;⁷ but the necessity for such

¹ *Bayley v. Mansell*, 4 Mad. 226 ; but see *White v. White*, 5 Beav. 221.

² — *v. Hobarts*, 1 J. & W. 251.

³ *Ibid.* ; see *Webb v. Lord Shaftesbury*, 7 Ves. 480.

⁴ The personal effects of a person deceased are generally ordered to be sold by the representatives, under the direction of the Master.

⁵ *Dalby v. Pullen*, 1 R. & M. 296. See *Hurt v. Stull*, 4 Maryland Ch. Dec. 391.

⁶ A sale of mortgaged premises under a decree must be made by the Master himself, or under his immediate direction. *Hyer v. Deaves*, 2 John. Ch. 154. A sale by a person deputed by the Master, in his absence, is irregular, and will be set aside. *Ib.* This decision was made under the statute of New York which directs "that all sales of mortgaged premises, under a decree, shall be made by a Master." *Ib.*

⁷ *Turner & V.* 401.

an order has been taken away by the 75th of the Orders of 1828, which directs, "That where estates or other property are directed to be sold before the Master, the Master shall be at liberty, if he shall think it for the benefit of the parties interested, to order the same to be sold in the country, at such place, and by such person, as he shall think fit."¹

Under this Order, a party desirous that the property should be sold in the country, or by an auctioneer, instead of the Master's clerk, should prepare and leave a proposal to that effect; and if, upon attending the warrant "to proceed," the Master is of opinion that the proposal should be adopted, he makes a report to that effect, which is filed in the usual manner, and does not require confirmation.²

It is to be observed, that the auctioneer, or person appointed to sell, is not allowed a *per centage* upon the purchase-money, but it is usual for the vendor's solicitor to make an arrangement with him, to sell the property for a fixed sum, the amount of which it is prudent to submit to the Master, on attending the warrant upon the proposal, so that no question may arise, on the taxation of costs, as to the propriety of the payment.³ It may be useful here to remark, that a proposal to appoint a London auctioneer or surveyor, to sell an estate in the country, would be rejected, and that an attorney or solicitor is disqualified.⁴

If the auctioneer, or other person appointed to sell, is to be authorized to receive deposits, or any other money, in respect of the property, he should give security, to be approved by the Master, duly to account.

Where it is desirable to have a reserved bidding appointed by the Master, for the purpose of preventing an estate from being sold at an under value, the proper course is to apply to the Court, by motion, for such a direction,⁵ when an order will be made for the Master to fix a reserved bidding, if he should think fit.⁶ The

¹ A sale on the land, under a decree ordering it to be made there, is entirely proper. *Mitchell v. Berry*, 1 Met. (Ky.) 602.

² 2 Smith, 193, 3d ed.

³ Ibid. 194.

⁴ 1 Turn. & V. 403.

⁵ Such a direction ought not to be inserted in a decree for sale, but ought to be the subject of a separate order. Per Sir J. Leach, M. R., in *Brooker v. Collier*, 3 Russ. 369.

⁶ *Shaw v. Simpson*, cited 1 J. & W. 392.

form of the Order is usually the same as that in *Jervoise v. Clarke*,¹ and in acting upon it a correct valuation of the estate should be made by a skilful surveyor, setting out, in schedules, the amount of the rental, and the estimated value of the whole estate, and of each lot separately, and the sum at which the same ought to be sold together, and also at what stated sum each lot ought to be sold. A state of facts, comprising, shortly, the valuation of the estate, and an affidavit of the surveyor, in support of the valuation, must be brought into the Master's office, whereupon the usual warrants "on leaving," and "to proceed," must be served and attended. The Master then draws a conclusion from the evidence before him, and fixes a bidding, as directed by the Order, which he commits to writing, and encloses under a sealed cover, and delivers to the person appointed to sell the estate, for the purposes mentioned in the Order, but he makes no report or certificate of the proceeding.²

Where an estate is directed to be sold before a Master, the particulars and conditions of the sale are prepared by the solicitor of the plaintiff,³ or other party having the conduct of the cause.⁴ They are intituled in the cause,⁵ and must contain a general description of the nature and situation of the property, in whose possession it is, or has lately been.⁶

The conditions of sale, which should be annexed to the particulars, are generally similar to those annexed to sales of estates by auction in the ordinary way.⁷ If a reserved bidding has been appointed by the Master, it should be mentioned in the conditions.⁸

¹ *Shaw v. Simpson*, cited 1 J. & W. 389.

² 1 Turn. & V. 404.

³ 2 Harr. ed. Newl. 490.

⁴ For information as to the form, &c., of these particulars, see 1 Sugden V. & P. 30, *et seq.*

⁵ See *Ray v. Oliver*, 6 Paige, 489.

⁶ 2 Smith, 189, 3d ed. The Master must not, in his description of the property, add any particulars which may unduly enhance the value thereof, or mislead the purchaser. *Veeder v. Fonda*, 3 Paige, 97. See *Post v. Leet*, 8 Paige, 337; *Seaman v. Hicks*, 8 Paige, 656. The advertisement should give such a description of the property as to indicate and identify it. *Kauffman v. Walker*, 9 Maryland, 229; *Merwin v. Smith*, 1 Green Ch. 182; *Den v. Tellers*, 2 Halst. (N. J.) 154.

⁷ See 1 Sugden V. & P. 30.

⁸ 2 Smith, 193, 3d ed. The sale by an officer will not be set aside because the terms of sale are unusually strict or severe, if the circumstances of the case call

After the particulars and conditions of sale have been prepared and allowed by the Master, the first advertisement for the sale must be prepared either by the plaintiff's solicitor or by the Master's clerk,¹ and the signature of the Master must be obtained to authorize the insertion of the advertisement in the Gazette.² The advertisement should also be inserted in other newspapers in London, and, if the sale is in the country, in the provincial papers published near the place where the property lies.

There are always two advertisements: in the first, no time is appointed for the sale.³ About three weeks or a month after the insertion of the first advertisement, a warrant must be taken out to fix a time for the sale, which must be served on the solicitors of all the parties. The warrant being attended, the Master, with the approbation of all parties, will fix the time; and the second advertisement, which is usually called the *peremptory advertisement*, stating the time, must then be prepared, and inserted in the Gazette and other newspapers.⁴

for rigid measures, and no design is manifested to oppress or injure the defendants. *Coxe v. Halsted*, 1 Green Ch. 311. But if the officer's conduct is grossly improper and oppressive, upon a sale by him, it seems he will be ordered to pay the costs of setting aside his report of sale, and of the subsequent proceedings therein. *Baring v. Moore*, 5 Paige, 48.

¹ This is sometimes done, for the purpose of saving time, before the particulars are settled.

² 1 Sugd. V. & P. 55; 2 Harr. ed. Newl. 490; see ante, pp. 1198, 1199. It is not necessary that advertisements of the sale of real estate by a sheriff or Master in Chancery should be signed by the officer with his own proper signature; whether the officer's name is signed to the advertisement by himself, or printed or signed by another, is immaterial. In either case it is a virtual signing by the officer. *Coxe v. Halsted*, 1 Green Ch. 311.

³ A reasonable notice, in the sale of lands under a decree of Chancery, is all that can be required, and such sale may be ordered in the discretion of the Chancellor, for cash or on credit. *Darrington v. Borland*, 3 Porter, 12. See *Penn v. Tolleson*, 20 Ark. 652. Where the sale is advertised for a specified day between the hours of *twelve and five o'clock in the afternoon*, and the property is sold in pursuance of such advertisement, the sale will not be set aside, although there is a propriety and convenience in specifying a particular hour between twelve and five o'clock for the sale. *Coxe v. Halsted*, 1 Green Ch. 311.

⁴ 1 Turn. & V. 404; 1 Sugd. V. & P. 56. Where land is sold without being advertised for sale, for the time or in the manner prescribed by the order, the sale is invalid and will be set aside. *Baily v. Baily*, 9 Rich. Eq. (S. C.) 392; *Vanbussum v. Maloney*, 2 Met. (Ky.) 602; *Glenn v. Wotten*, 3 Maryland Ch. Dec. 514. The report on the record should show that an advertisement was made, in a case where the sale is ordered to be made after advertising. *Clark v. Bell*, 4 Dana, 15.

By a general order of the Court, dated the 24th of March, 1814,¹ it is ordered, that the solicitor for the party prosecuting any decree or order of the Court for a sale, shall be at liberty, in cases in which the Master shall think fit, to print and disperse as many particulars as shall be thought beneficial, under the direction of the Master, in whose office such sale shall be, paying 6*d.* per side for so many printed copies as there shall have been actual bidders at the sale, and no more, and that such payments shall be allowed the solicitor upon the taxation of his costs.²

The sale, when it takes place at the Public Office, in Southampton Buildings, should be attended by the solicitor for the plaintiff, and is conducted in the following manner: — The Master's clerk prepares a paper, on which the biddings for the different lots are to be marked.³ This generally consists of a copy of the particulars of sale, with spaces between each lot.⁴ The lots are successively put up, at a price offered by any person present, such person signing his name to the sum which he offers, on the above paper.⁵ Every subsequent bidder must also sign his name to the sum he offers,⁶ until no person will advance on the last bidder, who is then declared the purchaser, unless there has been a reserved bidding fixed by the Master, in which case, if the last bidding does not reach the reserved bidding, the Master's clerk, or person selling, is to declare that the lot has not been sold, but has been bought in by the persons interested in the estate.⁷

It is to be observed, that, although there can be no doubt that a residuary legatee, or a tenant for life, or the owner of a rever-

¹ Beames's Ord. 483; 2 V. & B. 417.

² The fees to the Master's clerk are settled by an Order of the 23d of February, 1837, containing a schedule of fees, according to which, besides the usual fee of 1*l.* 1*s.* upon every advertisement, a fee of 3*l.* in addition to the reasonable travelling expenses of the Master's clerk, has been appointed to be paid upon every peremptory advertisement for the sale of property, to be repaid if the property shall not be offered for sale.

³ 1 Turn. & V. 404. See note below.

⁴ 1 Sugd. V. & P. 56.

⁵ 1 Turn. & V. 405.

⁶ *Ibid.*

⁷ Bids for property sold by order of the Chancellor are mere propositions to be rejected by him in the exercise of a reasonable discretion, if the sale has not been perfectly fair, or if an unconscientious advantage has been obtained by the purchaser. *Vanbussun v. Maloney*, 2 Met. (Ky.) 550.

sionary interest, may become a purchaser at a sale under the order of the Court,¹ it is necessary, if he be a party to the record, that he should have a previous order to warrant his being admitted as a bidder at the sale; and the Court will not permit a party, having such an order, to conduct the sale.²

The best bidder being declared the purchaser, must, in addition to the signature of his name after his bidding, add his description and place of abode. If he buys as agent, he signs A. B., agent for C. D., of — &c.³

The same process is gone through with respect to all the other lots, and if any lots are not sold, they must be again advertised for sale.⁴

If the sale takes place in the country, and any other person than the Master's clerk is appointed to sell, the person so appointed must proceed in the same manner as the Master's clerk; it is necessary, however, that he should verify the accuracy of the proceedings by affidavit. This affidavit is prepared by the Master's clerk, and generally states that the deponent proceeded to sell the estate, according to the printed particulars and conditions of sale thereof, settled and allowed by the Master, and specifies where and when the sale took place; and that he has annexed a schedule, containing a full and true account of all and every sum and sums of money which was or were bid for the said lots respectively, and also the names of all and every the persons and person who attended at the said sale, and bid for the lots respectively (this schedule is, generally, the original paper upon which the biddings taken at the sale were put down, and signed by the bidders); and

¹ *Williams v. Attenborough*, Turn. & R. 76; *Elworthy v. Billing*, 10 Sim. 98.

² *Domville v. Barrington*, 2 Y. & C. 724, Exch. Rep.; *Sidney v. Ranger*, 12 Sim. 118.

³ 2 Smith, 197, 3d ed.

⁴ 1 Turn. & V. 405. It is the duty of the sheriff to sell property plainly divided, in separate parcels; *Penn v. Craig*, 1 Green Ch. 495; if the property is so situated that it will probably produce more by that mode of selling; or where a part only is required to be sold. *Mohawk Bank v. Atwater*, 2 Paige, 54; *Merwin v. Smith*, 1 Green Ch. 182; *Coxe v. Halsted*, 1 Green Ch. 319; *Woods v. Morrell*, 1 John. Ch. 505; *Amer. Ins. Co. v. Oakley*, 9 Paige, 259. But the sale of several parcels together does not render the sale void, but only voidable; and after a great lapse of time the sale will not be disturbed. *Mohawk Bank v. Atwater*, 2 Paige, 54; *Penn v. Craig*, 1 Green Ch. 495. Where the order of the Court is that the premises be sold all in one lot, that order must be followed. *Babcock v. Perry*, 8 Wis. 277.

he further swears that the respective sums lastly set down as being the highest bidding for the said lots, were the highest and largest sums that were offered and bid for the same respectively at the said sale, and verifies the handwriting of the highest bidder to each lot, and that the whole of the sale was conducted by him, the deponent, in a fair, open, and candid manner, &c.¹

It is not usual, in sales of estates under the decrees of the Court, to require the purchaser to make any deposit.² It is, however, sometimes done; and it seems that, in cases where timber upon an estate is sold separately from the estate itself, the practice is to require a deposit; the conditions of a sale usually providing, that the purchaser of each lot shall sign an agreement for the performance of the conditions, and pay one third of the amount of the purchase-money, (or a certain *per centage* upon its amount,) in cash or Bank of England notes, at the time of the sale, to the person appointed to sell.³ Where such a direction occurs, or where from any other circumstance the person employed to sell any property, not being the Master's clerk, under the direction of the Master, is to receive money either in shape of deposit or otherwise, on account of the purchase-money, he will be required to give security, or enter into recognizances, to be approved by the Master, that he will duly pay the same into the Bank, in the name and with the privity of the Accountant-General.⁴

In a case mentioned by Mr. Smith,⁵ where the sale was of the materials of the old mansion-house, — upon the Master's making a report approving the person to sell, an order appears to have been made that such person should be at liberty to receive the purchase-money for the lots comprising the materials of the mansion, and that he should pay the same, from time to time, into the bank, in the name and with the privity, &c., the amount of such payments to be verified by his affidavit.

¹ 2 Smith, 199, 3d ed.

² Ibid. 200.

³ Ibid, 240.

⁴ On a Master's sale, which reserves to the Master a right to consider the biddings open until the deposit is paid, no sale can be enforced where the purchaser refuses to pay the deposit or sign an acknowledgment; and no order for a resale is necessary — the Master will go on as if no sale had taken place. *Hewlett v. Davis*, 3 Edw. Ch. 338.

⁵ *Fournier v. Duchess of Kent*, V. C. 19th July, 1828, 2 Smith, 218.

It may be mentioned here, that where timber is sold under the direction of the Court, the conditions of sale, besides providing that the purchaser of each lot shall sign an agreement for the performance of the conditions, and pay one third of the amount of the purchase-money, in cash or Bank of England notes, at the sale, generally stipulates that he shall give to the person appointed to sell, bills drawn upon and accepted by some other person or persons, for the remainder of the purchase-money, such bills to be approved of by the auctioneer, and made payable in London, at particular times in the conditions of sale expressed, and that no purchaser shall be permitted to enter or cut timber until such bills are given.¹ These conditions, however, vary according to the custom of the particular part of the country in which the estate, where the timber is growing, is situated; and, in some cases, instead of the above condition, it is provided that the purchaser, after making a deposit of 10*l.* per cent upon the amount of his purchase-money, shall, within a month, give security, to be approved by the Master, or enter into recognizances for the payment of the remainder.²

If the conditions are framed in this manner, the highest bidder of each lot signs an agreement, at the foot of the particulars of sale, whereby he agrees to become the purchaser of the lot, subject to the conditions; he then pays the deposit, and gives a bond, or enters into recognizances for payment of the residue, such bond or recognizances having been previously settled by the Master.³ With reference to this part of the subject, it may be stated, that where timber had been sold under such conditions as those above stated, the purchasers were discharged from that part of them which required them to enter into recognizances, on paying the remainder of the purchase-money to the receiver in the cause, deducting a discount of five per cent from the day of payment to the time the purchase-money was to be paid in.⁴

In ordinary sales by auction, or by private agreement, the contract is complete when the agreement is signed; but a different rule prevails in sales before a Master; in such cases the purchaser is not considered as entitled to the benefit of his contract till

¹ 2 Smith, 204, 3d ed.

² Ibid. 243.

³ See *Sitwell v. Sitwell*, 4 Mad. 183.

⁴ Ibid.

the Master's report of the purchaser's bidding is absolutely confirmed.¹

In order to obtain the benefit of his contract, therefore, the purchaser must first procure, at his own expense, a report from the Master, of his being the best bidder for the lot he has purchased.²

After the report has been filed, and an office copy taken by the purchaser, he must, at his own expense, apply to the Court by motion, that the purchase may be confirmed.³ This motion requires no previous notice,⁴ and the order made upon it will be that the purchase may be confirmed *nisi*, i. e., unless cause is shown against it within eight days after service of the order.⁵ The purchaser must, at his own expense, procure an office copy of this order from the Registrar, and he may serve it on the solicitors for all the parties in the cause.⁶ If no cause is shown within the eight days, the purchaser must, at his own expense, apply to the Court to confirm the order absolutely, which will be ordered of course on the production of an affidavit of the service of the order *nisi*, and a certificate of no cause having been shown. This certificate must bear date on the day of the application,⁷ and is obtained from the Registrar by application to the entering clerk and leaving the order *nisi* the day before.⁸ Notice of this application need not be given, and it may be made on any day of the Court sitting, whether in term time or vacation.⁹ But if the purchaser be served with notice of a motion to open the biddings, he cannot proceed to confirm his report absolutely.¹⁰

¹ 1 Sugd. V. & P. 58; and see *Vesey v. Elworthy*, 3 Dr. & W. 74. The purchaser takes subject to the ratification of the sale by the Court. *Kauffman v. Walker*, 9 Maryland, 229; *Tooley v. Kane*, 1 S. & M. Ch. 518.

But the effect of confirming the report of a Chancery sale is nothing more than the completion of the contract, and does not pass the legal title. *Webster v. Hill*, 3 Sneed (Tenn.) 333.

² *Ibid.* 59.

³ It may also be done by petition of course at the Rolls, 21st Ord. 1828. Each purchaser must obtain an order to confirm his own purchase. If he has purchased more than one lot, they must all be included in the same order; but two or more purchasers of one lot must join the application; see *Darkin v. Marye*, 1 Anst. 22.

⁴ 1 Sug. V. & P. 59.

⁵ *Ibid.*

⁶ 21st Order, 1828.

⁷ 1 Turn. & V. 405; and see ante, p. 1157, n. (1).

⁸ 1 Sugd. V. & P. 59.

⁹ *Lord Harborough v. Wartnaby*, 1 Ph. 364.

¹⁰ 1 Sugd. V. & P. 59; *Vansittart v. Collier*, 2 S. & S. 608.

It may be observed here, that if the purchaser, after he has obtained his order *nisi*, neglects to confirm it, the vendor may move to make it absolute without obtaining a new order *nisi*.¹ If the purchaser has not obtained an order *nisi*, the vendor may move for and obtain one; and it seems that, by consent, the order to confirm the report may be made absolute in the first instance; but this practice is irregular, as it precludes the opportunity given by the eight days in the order *nisi* to open the biddings.²

The bidder not being considered as the purchaser until the report is confirmed, is not liable to any loss by fire, or otherwise, which may happen to the estate in the interim³ nor is he until the confirmation of the report, compellable to complete his purchase.⁴

When the report has been absolutely confirmed, the purchaser is entitled to a conveyance, on payment of the purchase-money, and may, after giving notice of his intention, apply to the Court for leave to pay his purchase-money into the bank, and to be let into the possession of the estate; but this application should, of course, not be made until the title be approved of.⁵ For this purpose the solicitor for the purchaser, before he suffers his client to part with his purchase-money, usually applies to the plaintiff's solicitor for an abstract of the title to the lots purchased,⁶ which he may be compelled to deliver by order as before pointed out,⁷ and he should also ascertain that the sale has been made according to the decree; for it is a settled maxim of equity, that persons purchasing under a decree of the Court, are bound to see that the sale is made according to the decree;⁸ and if the Master has sold Greenacre when he ought to have sold Blackacre, it is a good ground of objection.⁹ It is also the business of a purchaser to see

¹ *Chillingworth v. Chillingworth*, 1 Sim. 291; *Lidbetter v. Smith*, 5 Beav. 377.

² 1 Turn. & V. 406.

³ 1 Sugd. V. & P. 60; *Ex parte Minor*, 11 Ves. 559; and see 13 Ves. 518; 1 J. & W. 639.

⁴ *Anon.* 2 Ves. jr. 335.

⁵ 1 Sugd. V. & P. 61; *Man v. Ricketts*, 5 De G. & Sm. 116.

⁶ 1 Turn. & V. 414.

⁷ *Ante*, p. 1212. See *Wood v. Mann*, 3 Sumner, 331, 332, as to the circumstances which would amount to a waiver by the purchaser of a reference of the title to a Master.

⁸ *Colclough v. Sterum*, 3 Bligh, 181, 186.

⁹ *Lutwyche v. Winford* 1 Bro. C. C. 250.

that all the persons who are necessary to convey are before the Court, for if he takes a title which a decree in an imperfect suit does not protect, he must abide the consequence.¹ A purchaser, however, will not be affected by error in the decree;² *e. g.* such as not giving an infant a day to show cause, in cases in which a day ought to be given,³ or decreeing a sale of lands to satisfy judgment debts, without an account of personal estate.⁴ But where there is an error in the decree, such as omitting to direct an inquiry whether the testator was a trader within the meaning of the bankrupt laws, the Court will not compel a purchaser to take an estate sold under it, even though the parties are proceeding to rectify the error.⁵

If the title is satisfactory, notice of motion that the purchaser may be at liberty to pay in his purchase-money into the bank, must be served upon the solicitor for the plaintiff. When the purchaser is liable to interest, the motion usually extends to the payment of interest, from the time at which his liability to interest commenced to the day of payment into Court, "to be verified by affidavit." If the title is not satisfactory the purchaser will have to carry in his objections, and, if allowed, he will be entitled to his costs of becoming a purchaser and of investigating the title.⁶

¹ *Colclough v. Sterum, ubi supra*; and see *Hamilton v. Houghton*, 2 Bl. 169; *Giffard v. Hort*, 1 Sch. & Lef. 386; *Bennett v. Hamill*, 2 Sch. & Lef. 566; *Alvanly v. Kinnaird*, 2 Mac. & Gor. 1.

² See *Winchester v. Winchester*, 1 Head. (Tenn.) 460; *Vanbussum v. Maloney*, 2 Met. (Ky.) 550; *Walker v. Morris*, 14 Georgia, 323.

³ *Ante*, p. 154. The doctrine of giving a day in Court to infants is not applicable to a divestiture of title by decree, but only where the infant is directed to convey. *Winchester v. Winchester*, 1 Head (Tenn.) 460.

⁴ *Bennett v. Hamill*, 2 Sch. & Lef. 566; see also, *Lloyd v. Johnes*, 9 Ves. 37; *Curtis v. Price*, 12 Ves. 89; *Burke v. Crosbie*, 1 B. & B. 489; *Lightburn v. Swift*, 2 B. & B. 207; *Baker v. Morgan*, 2 Dow. 526; *Mullins v. Townshend*, 1 Dow. & Clark, 430. The title of a purchaser at a sale under a decree, made by a Court of competent jurisdiction, is valid, although the decree be reversed, and the purchaser a party to the suit. *Gossom v. Donaldson*, 18 B. Monroe (Ky.) 230; *Ward v. Hollins*, 14 Maryland, 158. But in *Wambaugh v. Gates*, 4 Selden (N. Y.) 138, it was held that a title to land, acquired at a sale on a decree authorizing it, is extinguished by the reversal of the decree. A purchaser at a Chancery sale is not answerable for any disposition which the Court may make of the purchase-money. *Brown v. Wallace*, 4 Gill & John. 479.

⁵ *Lechmere v. Brasier*, 2 Jac. & W. 287; and see *Calvert v. Godfrey*, 6 Beav. 97; *Sherwood v. Beveridge*, 3 De G. & Sm. 432. If the error is not manifest, a reference will be directed. *Whitfield v. Legautre*, 3 De G. & Sm. 466.

⁶ *Pegg v. Wisdin*, 16 Jur. 1105; *Perkins v. Ede*, 16 Beav. 268.

With respect to the time from which a party is entitled to possession of the thing purchased, and liable to interest on his purchase-money, it may be mentioned, that the rule of Court in the case of the purchase of a fee simple estate, is to give the profits from the quarter day preceding the payment of the purchase-money,¹ and that, in conformity with this rule, the notice of motion for payment of the purchase-money generally, prays that the purchaser may be let into the possession or into the receipt of the rents and profits of the estate from that time.² The rule above stated, however, does not apply to collieries and mines, there being no such thing as quarter days in concerns of that description; the purchaser of such property is, therefore, only entitled to the profits from the commencement of the month in which he purchased, he paying his purchase-money in the course of that month.³

It is to be observed, that a purchaser of a freehold estate is not entitled to the rents for a period beyond the quarter day preceding the payment of his money, merely because he has been ready to complete his purchase, and has had his money lying dead in his banker's hands.⁴

If a purchaser gets into possession of the estate without the sanction of the Court, he will be compelled to pay the money into Court, although he entered with the permission of the parties in the cause, the Court only can give such permission.⁵

A purchaser of a reversionary interest will be ordered to pay interest on his purchase-money from the time of his purchase.⁶

¹ *Anson v. Towgood*, 1 J. & W. 637.

² *Hand*, 145.

³ 1 *Sugden V. & P.* 62; *Wren v. Kirton*, 8 Ves. 502; *Williams v. Attenborough*, 1 T. & R. 70.

⁴ *Barker v. Harper*, Cooper, 32; *Hutton v. Mansell*, 2 Beav. 260. Immediate possession will not be ordered where it will be attended with the loss of the then growing crop. *Chapline v. Chapline*, 1 Bland, 364; *Wright v. Wright*, 1 Bland, 365; *Taylor v. Colegate*, ib. 365; *Dorsey v. Campbell*, ib. 365.

⁵ 1 *Sugd. V. & P.* 62. The purchaser at a Chancery sale buys subject to the final order or decree of the Court, and if he take possession after the sale, at which he purchased, has been set aside, and the order of confirmation vacated, he is a trespasser, and is liable for all the mesne profits that accrue from the time of his entry till his eviction, and for all the crops and produce on the estate at the time of his entry. *Lapton v. Almy*, 4 Wis. 242.

⁶ *Trefusis v. Lord Clinton*, 2 Sim. 359. As to the payment of interest, see *Dyson v. Hornby*, 4 De G. & Sm. 481; *Storrey v. Walsh*, 18 Beav. 559; *Wood v. Mann*, 3 Sumner, 318.

In the case of a sale of a life interest in the dividends of stock in the public funds, the purchaser is liable to interest, from the time of the contract, and is entitled to the next dividend which becomes due after the sale, even if it be on the day next after that of the sale.¹ In the sale of an annuity, secured by deed and payable quarterly, a different rule appears to prevail; there the purchaser is considered as entitled to the annuity from the confirmation of the report, he paying interest from the first day on which the report might have been confirmed.²

If the estate is subject to an incumbrance, which appears upon the report, the purchaser, instead of the usual notice of motion, should apply to the Court for leave to pay off the charge, and to pay the residue of the purchase-money into the bank, &c.³ This, however, can only be done where the incumbrance appears on the Master's report; where this is not the case, and any of the parties refuse, or are incompetent to consent, a purchaser cannot apply any part of his purchase-money in discharge of the incumbrance, though, perhaps, if the parties be all competent to consent and do consent, it may be done.⁴

Where two or more persons purchase one lot, the money must be paid altogether; the Court will not allow them to pay their proportions separately, on account of the confusion which might ensue.⁵

Only the solicitor for the party conducting the sale, who, as we have seen, acts for all the parties, is entitled to appear on the motion to pay in the purchase-money, and he must take care that the amount of the purchase-money to be paid in, and the time when possession is sought, are correctly stated. He should also ask that any interest or other money which the purchaser ought to pay, but which is not specified in the notice of motion, should be included in the order.⁶ He may also ask that the money, when paid in, may be laid out in the purchase of stock in the public funds, and accumulated, though if such a direction is omitted, it may be made the subject of a separate order.

¹ *Anson v. Towgood*, 1 J. & W. 637.

² *Twigg v. Fifield*, 13 Ves. 517; see *Jackson v. Lever*, 3 Bro. C. C. 605.

³ 1 Sugd. V. & P. 61. As to costs in such a case, see *Hepworth v. Heslop*, 3 Hare, 485.

⁴ 1 Sugd. V. & P. 61; — *v. Stretton*, 1 Ves. jr. 266.

⁵ *Darkin v. Marye*, 1 Anst. 22; *Bulmer v. Allison*, 15 L. J. N. S. 11.

⁶ See 2 Smith, 205, 3d ed.

It is generally the practice, where the purchaser applies to pay in his purchase-money, to ask, on his behalf, that it may not be paid out again without notice to him. The object of this is, to give him a lien upon the purchase-money, till possession has been delivered, and the conveyance has been completed: but the Court will not impound the money, upon an objection from the purchaser, grounded on notice of an adverse claim. If evicted, he must resort to the covenants in his conveyance;¹ nor will the Court prevent the distribution of the purchase-money because the heir is an infant, or retain any part of it to answer the expense of a fine, which would become payable upon his coming of age.²

When a "stop order," to the effect above stated, has been made, the purchase-money cannot be distributed without the consent of the purchaser given in Court, or serving him with a copy of the order for setting down the cause for further directions, or of the petition for the distribution of the fund, and producing an affidavit of such service at the hearing of the cause or of the petition.³

Under the 13th and 15th of the Orders of August, 1841, a purchaser is now enabled to enforce the order for letting him into possession by the ordinary process of contempt, and by the writ of assistance.⁴

The purchaser, upon payment of his purchase-money into Court, is entitled to a conveyance of the estate, and it is incumbent on his solicitor to prepare the draft of the conveyance, and to tender it to the vendor's solicitor for his approbation.⁵ If objections are made to the draft which the solicitors cannot decide, and neither the decree nor the order for paying in the purchase-money authorize the Master to settle the conveyance, an order of reference to the Master to settle the conveyance, with the usual directions for the production of the title-deeds, &c.,⁶ must be obtained and served, and, with the draft of the conveyance, must be left at the Master's office, when the course already pointed out, with respect to the settlement of conveyances by the Master, will be pursued.⁷

¹ *Thomas v. Powell*, 2 Cox, 334.

² *Morris v. Clarkson*, 3 Swanst. 558.

³ See *Barton v. Latour*, 18 Beav. 526.

⁴ See ante, pp. 1079, 1082. See *Planters' Bank v. Fowlkes*, 4 Sneed (Tenn.) 461.

⁵ 1 Turn. & V. 421.

⁶ Ante, pp. 1153, 1154.

⁷ Ante, p. 1262. It is now usual in England for the Judge himself, in chambers, to decide upon questions in dispute concerning the draft conveyance.

The conveyance having been settled and engrossed, must be executed by the parties; and if any party refuses, an application should be made by the purchaser to the Court for an order that he may execute it.¹

The conveyance being executed, the purchaser is entitled to have the title-deeds relating to the estate delivered up to him. A direction for the delivery of them frequently forms part of the order for payment of the purchase-money into Court; if it does not, and the documents are in the Master's office, an order, that they may be delivered to him, may be obtained by the purchaser upon motion.² Where there are several lots, and the purchaser has not bought them all, the form of the order generally is, "that such of the title-deeds, &c., as relate solely to the lot purchased, and also such as relate to the same jointly with other lots of less value, be delivered to the purchaser, or to whom he shall appoint, he submitting to produce such last-mentioned deeds and writings, on necessary occasions, and to enter into a covenant for that purpose, and to give attested copies thereof when required, at the expense of the party requiring the same; but as to such title-deeds, as relate to the estate purchased jointly with other estates of greater value, he is to have attested copies thereof, at the expense of the estate; and the persons entitled to such estates of greater value, are to execute to him the like covenants, to produce such deeds and writings, on necessary occasions; and in case any dispute shall arise between the parties touching the copies of any particular deeds, the said Master is to settle the same."³

One order may embrace the delivery of all the deeds to the purchasers of the several lots.

It may be mentioned here, that the rule laid down in the above order (which was settled by Lord Hardwicke) is the rule generally adopted by the Court with regard to the right to the title-deeds of an estate sold by order of the Court. In *Kennard v. Christie*,⁴ Lord Eldon determined, that the purchaser of the largest lot is to have the title-deeds, and not the purchaser of several lots, although such several lots together were larger than the largest single lot.

¹ *Sitwell v. Millersh*, 4 M. & C. 581; and 15th Order of August, 1841.

² *Ibid*, 154.

³ *Rand*. 152.

⁴ March, 1809; cited 2 Smith, 211, 3d ed.

We have hitherto discussed the course of proceeding to complete a sale, as applicable to those cases only in which the purchaser is desirous and willing to complete it himself. It may, however, happen, that after he has been purchaser of a lot, he becomes unwilling to complete his purchase, — in that case it is for the vendor, or rather for the solicitor of the plaintiff, who, as we have seen,¹ is the person who acts on behalf of all parties, to take the necessary steps to compel him.²

The rule, that the Master's report of a purchase must be absolutely confirmed before the contract can be considered as binding, applies equally to cases in which it is sought to compel a purchaser to complete his purchase, as where it sought to enforce the contract against the vendor.³ As a preliminary step, therefore, towards enforcing the completion of the contract, it is necessary to have the report confirmed.⁴ This may be done, by the plaintiff's solicitor obtaining the report from the Master's office, and procuring the usual order *nisi*, that the report may be confirmed within a limited time, unless cause is shown to the contrary,⁵ and serving it upon the purchaser in person, as well as upon the solicitors of the other parties to the suit. If no cause is shown, then he must proceed to have the report confirmed, absolutely, in the manner before pointed out.⁶ Where the purchaser has already obtained an order *nisi*, the plaintiff may, as we have seen, proceed to confirm it, absolutely, without a fresh order *nisi*.⁷

¹ Ante, p. 1264.

² Where a person becomes a purchaser under a decree of the Court of Chancery, he submits himself to the jurisdiction of the Court, in that suit, as to all matters connected with such sale, or relating to him in the character of purchaser. *Requa v. Rea*, 2 Paige, 339; *Clarkson v. Read*, 15 Grattan (Va.) 288; *Gross v. Pearsy*, 2 P. & H. (Va.) 483; *Blackmore v. Barker*, 2 Swan (Tenn.) 340; *Stimson v. Meade*, 2 Rhode Isl. 541. And the Court may by attachment compel a purchaser at a sale by the Master, to complete his purchase, by paying in the purchase-money. So of a surety for the purchaser. *Wood v. Mann*, 3 Sumner, 318; *Gordon v. Sims*, 2 M'C. Ch. 151. But they will not be attached for contempt, in refusing to pay the purchase-money, until an order to pay the purchase-money has been passed. *Cowell v. Lippitt*, 3 Rhode Is. 92.

³ *Anon.* 2 Ves. jr. 336; *Childress v. Hurt*, 2 Swan. (Tenn.) 487.

⁴ *Ibid.* Payment cannot be resisted on the ground of irregularity in a sale, after the sale has been confirmed by the Court, and the time for appeal has expired. *Todd v. Dowd*, 1 Met. (Ken.) 281.

⁵ Ante, pp. 1271, 1272.

⁶ *Ibid.*

⁷ Ante, pp. 1271, 1272.

Having confirmed the Report of the Master, an important consideration arises, viz. whether the purchaser is in a situation to complete his contract ; for if he is not a responsible person, it will be better that the matter should stop here than that any further expense should be incurred. If, therefore, it should appear that the purchaser is unable to perform his contract, a motion may be made to discharge him from his bidding, and that the estate may be resold with the approbation of the Master.¹ An order may be made upon this motion, with the purchaser's consent ;² but if he does not consent, notice of it should be served on the purchaser, and it should be supported by an affidavit of the facts upon which it is considered right to make it.³

According, however, to the present practice, a more complete remedy is afforded against a purchaser refusing without cause to fulfil his contract, for the plaintiff may obtain an order for the estate to be resold, and for the purchaser to pay as well the expenses arising from the non-completion of the purchase, the application and the resale, as also any deficiency in price arising upon the second sale.⁴ This order was made by Lord Cottenham in *Harding v. Harding*,⁵ after consultation with the other Judges of the Court ; and although in that case the purchaser was a defendant in the cause, it does not seem that that fact was considered as necessary, in order to enable such an order to be made.⁶

It may be mentioned here, that if it is discovered that the pur-

¹ *Hodder v. Ruffin*, 1 V. & B. 544 ; 1 Sug. V. & P. 60 ; *Cunningham v. Williams*, 2 Anst. 344.

² *Hand*, 153.

³ See 2 Smith Ch. Pr. (2d Am. ed.) 204, note (a), 174, note (a) ; *Deaver v. Reynolds*, 1 Bland, 50.

⁴ See *Simmons v. Tongue*, 3 Bland, 341 ; *Mullikin v. Mullikin*, 1 Bland, 541 ; *Vannerson v. Cord*, 1 S. & M. Ch. 345 ; *Gross v. Percy*, 2 P. & H. (Va.) 483 ; *Clarkson v. Read*, 15 Grattan (Va.) 288. Upon a sale by a Master, if the bidder to whom the property is struck off refuses to complete the purchase, the Master should resell the property, and should not allow another person to take it at the former bid. *Thompson v. Dimond*, 3 Edw. Ch. 298. Where, by the conditions of sale, it is provided, that "if the purchaser do not comply with the conditions, the property shall be resold," the officer is not bound, upon a failure of the purchaser to comply with the conditions to make a second sale, though requested to do so by the defendant in execution. *Woodhull v. Neafe*, 1 Green Ch. 409. See *Thompson v. Dimond*, 3 Edw. Ch. 298 ; *Hewlett v. Davis*, 3 Edw. Ch. 338.

⁵ 4 M. & C. 514.

⁶ *Saunders v. Gray*, quoted 4 M. & C. 515.

chaser was insane at the time of the bidding, he may be discharged from his purchase. The Court, however, will not, in such case, direct the next best bidder to be declared purchaser, although asked to do so on behalf of all the parties in the cause, and the bidder consents, but will direct a resale.¹

If the purchaser is responsible, the Court will, if required, make an order that he shall, within a given time, pay the money into Court, and be let into possession.² Upon hearing the motion for this order, the Court will, if the purchaser appears and asks for it, and has not precluded his right to object to the title, direct a reference to the Master to inquire whether a good title can be made.³ The purchaser may, also, set up any claim he may have to compensation for any deficiency.⁴

The same rule was laid down by Lord Thurlow in *Bannister v. Way*,⁵ and appears to have been acted upon by Lord Eldon in *Hodder v. Ruffin*⁶ and in *Sanders v. Grey*;⁷ and it has been

¹ *Blackbeard v. Lindigren*, 1 Cox, 205.

² 1 Newl. 335.

³ *Ibid.* 336. *Gordon v. Sims*, 2 M'Cord Ch. 167. When the purchaser at the Master's sale, purchases under the assurance that he is to receive a perfect title, if such title cannot be given, he will not be compelled to complete the purchase. *Morris v. Mowatt*, 2 Paige, 586; *Myers v. Raymond*, 5 Florida, 516. A purchaser has a right to require, under such circumstances, a title, which is good both at Law and in Equity. *Morris v. Mowatt*, *supra*; see *Seaman v. Hicks*, 8 Paige, 656. Where the person conducting the sale of personal property gives notice at the sale that there is no warranty of the soundness of the property, the rule *caveat emptor* applies and the purchaser will be bound to pay, though the property should prove unsound. *Parker v. Partlow*, 12 Rich. Law (S. C.) 679. In Maryland, the rule of *caveat emptor* applies to all judicial sales. Chancery in no case attempts to sell anything more than the title of the parties to the suit; and it allows of no inquiry into the title at the instance of the purchaser or any one else. *Brown v. Wallace*, 4 Gill & John. 479; *Anderson v. Foulke*, 2 Harr. & Gill, 346; *Farmers' & Planters' Bank v. Martin*, 7 Maryland, 342; see *Atkinson v. Farmer*, 2 Murph. 291. In *Spring v. Sandford*, 7 Paige, 556, it was held that where real estate is sold by a Master under a decree of a Court of Chancery, as and for a good title, the purchaser is only entitled to such a title as a purchaser of the premises at a private sale would be bound to receive from his vendor. See *Jackson v. Edwards*, 7 Paige, 386; S. C. 22 Wendell, 498; *Matter of Browning*, 2 Paige, 64; *Dunham v. Minard*, 4 Paige, 441; *Weems v. Brewer*, 2 Harr. & Gill, 390.

⁴ 2 Smith, 224, 3d ed.

⁵ *Ex relatione* E. D. Colvill, Regist.; see also, Reg. Lib. A. 1788, 425, S. C.

⁶ Cited 1 Newl. 336; and see Reg. Lib. A. 1810, 44, S. C.

⁷ This case is cited by Mr. Newland, vol. 1, p. 337, as an authority for the contrary proposition; but upon reference to the Registrar's book, it appears that a

recently acknowledged by Lord Langdale, M. R.,¹ so that it seems to be now the undoubted practice of the Court, that, before an order can be made to compel an absent purchaser to pay in his money, the solicitor for the plaintiff must deliver to the purchaser an abstract of the title, and procure the Master's report that a good title can be made.²

The order for payment of the purchase-money being made must be served personally upon the purchaser, and if not complied with, may be enforced in the ordinary manner.³

A sale before a Master is not within the Statute of Frauds, and after a confirmation will be enforced against the representatives of the purchaser, although not signed; the judgment of the Court taking it out of the statute.⁴ The Court, however, cannot enforce the contract against them, without a suit, but it will allow the heir to have the benefit of the contract,⁵ upon payment of the purchase-money, leaving it to him to compel the executors to reimburse him, if they have assets; and, where the heir refused to accede to this arrangement, the Court directed a resale, reserving the consideration as to any deficiency that might arise on the resale, and by whom the costs of it were to be repaid.⁶

From what has been stated, it will be perceived, that where a sale has been fairly and properly conducted, and the party is able to complete his contract, he will be held strictly to his bargain.⁷ Where, however, the contract is unreasonable, the Court will relieve the purchaser as well as the seller.⁸ Thus, in *Savile v. Savile*,⁹ a purchaser at a sale under the Court, which took place about the time of the South Sea bubble, was discharged from his reference was made to the Master to inquire into the title. Reg. Lib. B. 1810, 456.

¹ *Smart v. M'Lellan*, Rolls, 14 Jan. 1840.

² Ante, p. 1273.

³ Ante, p. 1058.

⁴ 1 Sugd. V. & P. 65, cites *Attorney-General v. Day*, 1 Ves. 218.

⁵ A bidder, at a sale by a Clerk and Master in Equity, may assign his bid, and a deed to the assignee passes the title. *Campbell v. Baker*, 6 Jones Law (N. C.) 255.

⁶ *Lord v. Lord*, 1 Sim. 203.

⁷ See *Jewett v. Miller*, 10 N. York (6 Selden) 402.

⁸ 1 Sugd. V. & P. 71; *Clayton v. Glover*, 3 Jones Eq. (N. C.) 371; *Lachlan v. Reynolds*, 1 Kay, 52; *McCulloch v. Gregory*, 1 Kay & J. 286. See *Lankford v. Jackson*, 21 Alabama, 650.

⁹ 1 P. Wms. 745.

purchase on submitting to forfeit his deposit, on the ground of the exorbitance of the price.¹

With respect to the last case, however, it is to be observed that there is no doubt, now, that the circumstance, that the price given is much beyond the value of the estate, will not be, of itself, a sufficient ground to release a purchaser from his contract even upon the terms of forfeiting a deposit.² Where, however, the purchaser has, by *mistake*, given an unreasonable price for an estate, the Court will, in a proper case, wholly rescind the contract.³ But if a person without authority interfere in a sale and bid, although he does it to prevent the property being sold at an undervalue, the Court will not release him.⁴

It is to be remarked, that if a purchase be rescinded, after the purchaser has paid his money into Court, he must, if it has been laid out upon his application, take back the stock, whether the funds have fallen or risen since the investment.⁵

It may be mentioned here, that if, after becoming the bidder for an estate, the purchaser is desirous of being discharged from his contract, and of substituting another person in his stead, the

¹ See *Gist v. Frazier*, 2 Litt. 118; *American Ins. Co. v. Oakley*, 9 Paige, 259; *Tripp v. Cook*, 26 Wendell, 143.

² 1 Sugd. V. & P. 71, and the case of General Birch's estates there cited; and see *Sewell v. Johnson*, Bunb. 76. See *Gardner v. Schermerhorn*, 1 Clarke, 101; *Tripp v. Cook*, 26 Wendell, 143; *Reed v. Brooks*, 3 Litt. 127; *Hart v. Bleight*, 3 Monroe, 273. A purchaser under a Master's sale will not be let off from his purchase by a submission to forfeit his deposit. *Wood v. Mann*, 3 Sumner, 317.

³ 1 Sugd. V. & P. 72; *Morshead v. Frederick*, cited *ibid.* A sale was set aside at the instance of the purchaser, on account of a serious mistake in the representation of the lands. *Gordon v. Sims*, 2 M'Cord Ch. 159; *Laight v. Pell*, 1 Edw. Ch. 577. So a sale was set aside because it was knocked off to the purchaser prematurely, by a mistake of the auctioneer, who did not hear a higher bid. *Gordon v. Sims*, 2 M'Cord Ch. 159. See *Anderson v. Foulke*, 2 Harr. & Gill, 346; *Campbell v. Gardner*, 3 Stockt. (N.J.) 423. So where there has been surprise. *Williamson v. Dale*, 3 John. Ch. 290. See, for other causes for which a resale will be ordered, *Millsbaugh v. McBride*, 7 Paige, 509; *Tripp v. Cook*, 26 Wendell, 143; *Brown v. Frost*, 10 Paige, 243; *American Ins. Co. v. Oakley*, 9 Paige, 259; post, 1284, note. Where land sold under a decree has been sacrificed by the neglect or mistake of the Master, the parties injured are entitled to a resale, or such other relief as can be given, without doing injustice to *bona fide* purchasers. *Amer. Ins. Co. v. Oakley*, 9 Paige, 259. A sale may be restrained where there is an attempt to make it under such circumstances as must necessarily cause a sacrifice. *McGown v. Sandford*, 9 Paige, 290.

⁴ *Nelthorpe v. Pennyman*, 14 Ves. 517.

⁵ *Hodder v. Ruffin*, V. C., 21st March, 1825, cited Sugd. V. & P. 71.

Court will, on motion, make an order to that effect; he must, however, support his motion by an affidavit that there is no underbargain, for the new purchaser may give the other a sum of money to stand in his place, and so deceive the Court:¹ and the rule appears to be, that if a purchaser resell behind the back of the Court before his purchase is confirmed, the second purchaser is considered a substituted purchaser, and must pay the additional price into Court for the benefit of the estate.²

Where estates are sold before a Master, under the decree of a Court of Equity, the Court considers itself to have greater power over the contract than it would have were the contract made between party and party;³ and, as the chief aim of the Court is to obtain as great a price for the estate as can possibly be got, it is in the habit, after the estate has been sold, of "*opening the biddings*," that is, of allowing a person to offer a larger price than the estate was originally sold for, and, upon such offer being made, and a proportionate deposit paid in, of directing a resale of the property.⁴

¹ *Rigby v. Macnamara*, 6 Ves. 515; *Vale v. Davenport*, *ibid.* 515; formerly the practice appears to have been, to make the order on consent of all parties without such affidavit. *Matthews v. Stubbs*, 2 Brown, 391.

² *Hodder v. Ruffin*, 1 Tamlyn, 341. See *Proctor v. Farnam*, 5 Paige, 614; *Campbell v. Baker*, 6 Jones Law (N. C.) 255.

³ See *Savile v. Savile*, 1 P. Wms. 747.

⁴ The English practice in opening biddings upon an advance on a Master's sale is not recognized in New York, North Carolina, Maryland, Tennessee, New Jersey, or South Carolina. *Gardner v. Sehermerhorn*, 1 Clarke, 101; *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167; *Andrews v. Scotton*, 2 Bland, 629; *Young v. Seague*, 1 Bailey Eq. 14; *Seaman v. Riggins*, 1 Green Ch. 214; *Williamson v. Dale*, 3 John. Ch. 290; *Henderson v. Lowry*, 5 Yerger, 230; *Houston v. Aycock*, 5 Sneed (Tenn.) 406; *Penn v. Tolleson*, 20 Ark. 652; *Gordon v. Sims*, 2 McCord Ch. 158; and the Chancellor of New York, in *Duncan v. Dodd*, 2 Paige, 100, observes that it is not desirable that it should be introduced there. See also to the same effect, *Collier v. Whipple*, 13 Wendell, 224. See further upon the practice of opening biddings, *Scott v. Nesbit*, 3 Bro. C. C. (Perkins's ed.) 475, notes (1), (a), and (b), and cases cited; *Anon.* 1 Sumner's Vesey, 453, note (a), and cases cited; *Andrews v. Emerson*, 7 Sumner's Vesey, 420, note (a); *Cheatham v. Grugeon*, 5 ib. 86, note (a); 1 Sugden Vend. and Purch. (6th Am. ed.) 86 [122] et seq. and notes; *Anderson v. Foulke*, 2 Harr. & Gill, 346. The biddings will not be opened in New York, except for special cause, *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167, and not then unless the purchaser, being himself free from fault, is fully indemnified for all damages, costs, and expenses, to which he has been subjected. *Duncan v. Dodd*, 3 Paige, 100; *Collier v. Whipple*, 13

Any person may open the biddings, and there seems to be no doubt that a person who is interested in the produce of the estate, such as a residuary legatee,¹ or a tenant for life or reversioner may do so;² but the opinion of the Court appears to have fluctuated upon the question, whether the Court will entertain an application to open biddings on behalf of a party who was present at the sale.

It is to be noticed, that mere advance of price, if the report of the purchaser being the best bidder is not absolutely confirmed, is sufficient to open the biddings,³ and that they may be opened more than once.⁴

With respect to the advance which the Court will consider necessary to be deposited, before it will permit the biddings to be opened in ordinary cases, it is to be noticed, that an advance of 10*l.* per cent was formerly considered to be sufficient on a large sum;⁵ but in *Andrews v. Emerson*,⁶ Lord Eldon said that the rule of 10*l.* per cent was not a wise rule to establish, as the consequence was, that you never got more, and desired it to be observed, that in future there should be no such rule.⁷ In *White v.*

Wendell, 224; *Lansing v. M'Pherson*, 3 John. Ch. 425; *Williamson v. Dale*, 3 John. Ch. 290; *Requa v. Rea*, 2 Paige, 339; *North River Ins. Co. v. Holmes*, 1 Hoff. Ch. Pr. 146, 149; *American Ins. Co. v. Oakley*, 9 Paige, 257; *Post v. Leet*, 8 Paige, 357; *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167. So in South Carolina, *Frazier v. Hall*, 2 M'Cord Ch. 159, note (2). So in Maryland, *Anderson v. Foulke*, 2 Harr. & Gill, 346. So in Tennessee, *Henderson v. Lowry*, 5 Yerger, 240. See *Wood v. Hudson*, 5 Munf. 423; *Campbell v. Gardner*, 3 Stockt. (N. J.) 423. The effect of opening the biddings, is to discharge the purchaser from his purchase entirely. *Price v. Price*, 1 Sim. & Stu. 386.

¹ *Hooper v. Goodwin*, Coop. 95; *Chapman v. Fowler*, 3 Hare, 577.

² *Williams v. Attenborough*, T. & R. 70; *M'Culloch v. Cotbach*, 3 Mad. 314; *Preston v. Barker*, 16 Ves. 140; *Thornhill v. Thornhill*, 2 J. & W. 347.

³ A resale will not be ordered in New York either before or after the confirmation of the report of sale, upon an offer of an increased price alone. *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167.

⁴ 1 Sugd. V. & P. 66; *Scott v. Nesbitt*, 3 Bro. C. C. 475.

⁵ Anon. 3 Mad. 494. In many cases, however, the Court has opened biddings upon a less advance; see *Tait v. Lord Northwick*, 5 Ves. 655, where the biddings were opened on an advance of 200*l.* on 2,360*l.*; and Anon. 5 Ves. 148, where the Court refused to open the biddings on an advance of 100*l.* upon 3,200*l.* but opened them on an advance of 200*l.*

⁶ 7 Ves. 420.

⁷ There is in Ireland no fixed rule of advance; therefore the Court will always open the biddings, where it is for the benefit of the estate to do so. *Digby v.*

Wilson,¹ his Lordship repeated the same opinion as to the impolicy of such a rule, but nevertheless said, that in some cases he should be satisfied with that, (*i. e.* an advance of 10*l.* per cent); in some, he should be satisfied with less; and in some he should require more. And accordingly, in *Brooks v. Smith*,² it being a creditor's suit, his Lordship permitted the biddings to be opened upon an advance of 5*l.* per cent on 10,000*l.* In *Garstone v. Edwards*,³ however, Sir J. Leach, V. C., who appears to have been favorable to an adherence to the rule of 10*l.* per cent,⁴ refused an offer of 350*l.*, being at the rate of six and a half per cent on 5,300*l.* observing, that the case cited,⁵ merely established, that where an advance so large as 500*l.* was offered, the Court would act upon it, though it was less than 10*l.* per cent;⁶ so that, on the whole, it may be concluded that, although in the case of an advance of so large a sum as 500*l.*, the Court will permit the biddings to be opened, even if it is under 10*l.* per cent, yet the Court, in ordinary cases, considers 10*l.* per cent (which is the usual amount of the deposit paid upon sales by auction out of Court) as a proper deposit to be paid when biddings are opened.⁷

When, however, the timber upon a lot sold has been taken at a valuation, the advance must be calculated upon the amount of the timber, as well as upon the price of the lot.⁸ And it is to be observed, that whatever the rate of the advance offered may be, the Court will not permit biddings to be opened unless the deposit offered amounts to at least 40*l.*⁹

It may be mentioned here, that in *Watts v. Martin*,¹⁰ where an *Browne*, 1 Irish Eq. 377. Whether the biddings will be opened or not, is a question to be determined by the particular circumstances of each case. *Mayne v. Macartney*, 2 Irish Eq. 324; *O'Connor v. Richards*, Sausse & S. 246. After a sale of property by a decree to enforce a lien, a petition for a resale of the property will not be granted, unless the petitioner state the amount which he is ready to bid in advance of the bid already taken. *Wright v. Cantzon*, 31 Miss. (2 George) 514.

¹ 14 Ves. 151.

² 3 V. & B. 144.

³ 1 S. & S. 20.

⁴ See *Anon.* 4 Mad. 494.

⁵ *Brooks v. Snaith*, *ubi supra*.

⁶ See also, *Lefroy v. Lefroy*, 2 Russ. 606.

⁷ See *Anon.* 3 Mad. 494; see *Bourn v. Bourn*, 13 Sim. 189.

⁸ *Bates v. Bonner*, 6 Sim. 380.

⁹ *Farlow v. Wieldon*, 4 Mad. 460; *Leland v. Griffith*, 2 Moll. 510.

¹⁰ 4 Bro. C. 113.

estate had been sold before the Master, in separate lots, and an application was made that it might again be put up to sale in one lot, a considerable advance having been offered, the purchasers of the lots opposed the motion, on the ground that, in the expectation of a sale in different lots, they had expended their time and money in making surveys, &c., of the estate, which they would not have done had they known that the estate was to be sold in one lot; and that, in making the order, (which was consented to by the residuary legatee and trustee,) the Court in consequence of the hardship of the case, directed the party applying to open the biddings to pay the *costs, charges, and expenses* occasioned to the purchasers by the biddings, to be settled by the Master, in case the parties differed.¹

In that case, the Court favored the applicant, by departing, to a certain extent, from its ordinary rules; in general, however, as the biddings are merely opened for the benefit of the suitor, the Court will not step out of its course to favor any other person; therefore, where a motion was made to open a bidding of 5,020*l.* on an advance of 150*l.* only, on the ground that the party had mistaken the time of sale, the Lord Chancellor held the circumstance, that the bidder was too late, to be no ground at all, and said he would not open the bidding for a less over-bidding than 500*l.*²

Where the biddings are opened, the purchaser is entirely discharged from his purchase; and if he has paid a deposit, or any part of the purchase-money, into Court, he will be entitled to have it paid out to him. If he is the purchaser of more lots than one, and the biddings are ordered to be opened as to some of the lots which were first purchased, the purchaser will be allowed to have the biddings opened, and to be discharged from his purchase, as to all the lots which he has purchased, it being considered but reasonable, that if, having become the purchaser of a subsequent lot, in consequence of his being declared the best bidder upon the prior lot, he should, if he is deprived of the purchase of the first lot, have the option of retaining or retiring from the subsequent lots.³ The purchaser, in order to entitle himself to such an indulgence, should appear upon the motion to open the biddings, and produce

¹ See S. C. edit. Belt. 113.

² Anon. 1 Ves. jr. 453.

³ Price v. Price, 1 S. & S. 386; see also, Fielder v. Fielder, cited ib.; and Boyer v. Blackwell, 3 Anst. 656.

an affidavit that he had bid for the subsequent lots in consequence of his having been declared the best bidder for the first lot.¹

It may be observed, that the rules which regulate the practice of opening biddings upon the sale of a landed estate, do not apply when a colliery is the subject of the sale.

The proper time for opening the biddings is before the Master's report of the sale has been confirmed absolutely ; after that, increase of price alone, however large, is not sufficient to induce the Court to grant the application, although it is a strong auxiliary argument when there are other grounds.² In a case,³ however, before Lord Rosslyn, this rule, although so frequently acknowledged and acted upon, was not attended to, but biddings were opened after the report was absolutely confirmed, merely on an advance of price. This case is now completely overruled.⁴

But very particular circumstances may, perhaps, induce the Court to open the biddings, after confirmation of the report, if the advance be considerable.⁵ Thus, in a case,⁶ where the owner of

¹ See *Fielder v. Fielder*, *ubi supra* ; *Bates v. Bonner*, 6 Sim. 380.

² 1 Sugd. V. & P. 67. The ratification of a judicial sale is final and conclusive, unless irregularly made by the Court, or unless the purchaser was prevented by misrepresentation, surprise, or fraud, of persons interested in the sale, from making his objection to the ratification in due time. *Brown v. Gilmer*, 8 Maryland, 322.

³ *Chethem v. Grugeon*, 5 Ves. 86 ; and see his Lordship's decision, when Lord Commissioner, in *Prideaux v. Prideaux*, 1 Bro. C. C. 287.

⁴ 1 Sugd. V. & P. 67.

⁵ "The practice pursued by the Court of Chancery in New Jersey, in opening biddings, or setting aside sales after a decree, has assimilated very much to the English practice after a report of sale, and confirmation of the same. According to the practice in the Court of Chancery in England, if parties apply to open biddings before the report is confirmed, it is a matter of course to open them on payment of costs and making a deposit ; but after confirmation, a special ground upon evidence is required. This Court has never interfered with a sale for mere inadequacy of price, but has uniformly declined doing so. It has always required some special ground to be laid, such as fraud or accident, which has prevented a fair sale of the property, and worked injustice to some party whose interest is affected by the sale. The special ground which, by the English practice, is required to open a sale *after confirmation*, has always been required by this Court to open a sale when the property has been struck off to the purchaser. In England, a sale confirmed is upon the same footing as a sale here, which has been confirmed (not by the Court, for that is not required,) but by the sheriff's completing all that is necessary to be done, as, sale upon his execution, and delivery

⁶ *Watson v. Birch*, 2 Ves. jr. 51 ; 4 Bro. C. C. 172, S. C. See *Seamans v. Riggins*, 1 Green Ch. 214.

the estate (who joined in a motion for the purpose of opening biddings, after the report was absolutely confirmed,) was in prison at the time of the confirmation, and it appeared that he would have opened the biddings before confirmation of the report, had he been able; and had even directed persons to bid more than what the estate sold for, who deceived him, and an advance of 4,000*l.* (being more than one fourth of the original purchase-money,) was offered, the biddings were opened on the deposit of the 4,000*l.* being made.

Strong as the circumstances in this case were, Lord Eldon, in a subsequent case, expressed great disapprobation of the decision, and determined, generally, that after a purchaser has confirmed his report, unless some particular principle arises out of his character, as connected with the ownership of the estate, or some trust or confidence, or his own conduct in obtaining his report, the bidding ought not to be opened.¹ Lord Redesdale, also, in a case before him, held that biddings could not be opened after the report was absolutely confirmed, unless on the ground of fraud on the part of the purchaser; and said, he considered it to the advantage of suitors to observe greater strictness in opening biddings, as it would procure better sales.² And in a still later case, Lord Eldon adhered to the same rule, and said that he could not do a thing more mischievous to the suitors, than to relax further the binding nature of contracts in the Master's office, half the estates that are sold in the Court being thrown away, upon the speculation that there will be an opportunity of purchasing them afterwards, by opening the biddings.³

of his deed to the purchaser. The same objection, therefore, which would exist to the opening of a sale by this Court, upon motion or petition, after the sheriff had delivered his deed, would operate with equal force against that practice after a confirmation of sale, if such confirmation were necessary." Chancellor Williamson, in *Campbell v. Gardner*, 3 Stockt. (N. J.) 424, 425. In this case it was held, that, after a sale upon an execution out of the Court of Chancery, and a delivery of the deed, the Court may, upon a proper case made, open the sale upon petition. And it is not a valid objection to this course, that the deed has become a matter of record. If a resale is ordered, the Court may require the first purchaser to release to the purchaser, on the resale, all the title he may have acquired by his deed, so that the title may stand upon the record wholly disencumbered. *Campbell v. Gardner*, 3 Stockt. (N. J.) 427, 428.

¹ *Morice v. The Bishop of Durham*, 11 Ves. 57.

² *Fergus v. Gore*, 1 Sch. & Lef. 350.

³ *White v. Wilson*, 14 Ves. 151.

Fraud will, of course, be a sufficient ground for opening the biddings.¹ Therefore, if the parties agree not to bid against each other,² or if a survey be made of an estate with some degree of collusion with the tenants, and it misrepresents the value and quality of the estate, and some of the purchasers are aware of this fraud in making the survey, and the owner is ignorant of it;³ or if the purchaser of the estate be a partner with the solicitor in the cause, and is in possession of some particular knowledge, to the benefit of which the other parties were entitled;⁴ in all these cases the Court will open the biddings, although the report has been absolutely confirmed.⁵

¹ *Collier v. Whipple*, 13 Wendell, 224; *Williamson v. Dale*, 3 John. Ch. 296; *Tripp v. Cook*, 26 Wendell, 143. So, mistake in some cases. *Laight v. Pell*, 1 Edw. Ch. 577; *Gordon v. Sims*, 2 M'Cord Ch. 159; *Post v. Leet*, 8 Paige, 337; *Anderson v. Foulke*, 2 Harr. & Gill, 346; *Requa v. Rea*, 2 Paige, 339; *Amer. Ins. Co. v. Oakley*, 9 Paige, 259; *Greele v. Emery*, in Chan. N. Y., Feb. 16, 1841; *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167; *Campbell v. Gardner*, 3 Stockt. (N. J.) 423; *Story Sales* (3d ed.) § 482 *et seq.*

The circumstance that there were but two purchasers present does not prove fraud in a sale, if it was duly advertised, and there is no proof of any attempt to keep away purchasers. *Mitchell v. Berry*, 1 Met. (Ky.) 602. But the sale was set aside in a case where the day of sale was so inclement as to deter several persons from attending who intended to be present, and only one bidder was present, and that bidder lived at the place. *Roberts v. Roberts*, 13 Grattan (Va.) 639.

² See *Watson v. Birch*, 2 Ves. jr. 52; *Story Sales* (3d ed.) § 484, and cases cited in notes.

³ *Ryder v. Gower*, 6 Bro. P. C. 306, and see *Watson v. Birch*, 2 Ves. jr. 53.

⁴ *Price v. Moxon*, July 14, 1754, before Lord Hardwicke; *Ryder v. Gower*, *ubi supra*; and see *Watson v. Birch*, 2 Ves. jr. 54; *Brinkerhoff v. Brown*, 4 John. Ch. 675.

⁵ Where the purchase at a Chancery sale is not *bona fide*, it is not necessary, in order to set aside the sale, on the application of the parties injured, that an advance on the bid, or any sum whatever, should have been deposited in court. *Penn v. Tolleason*, 20 Ark. 652. See *Childress v. Hunt*, 2 Swan (Tenn.) 487.

A resale will be ordered where there has been fraud or misconduct in the purchaser; fraudulent negligence or misconduct in any other person connected with the sale; surprise or misapprehension, created by the conduct of the purchaser, or of some person interested in the sale, or of the officer who conducts the sale. *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167.

The Court will not set aside a sale under its own decree for mere inadequacy of price, *House v. Walker*, 4 Maryland Ch. Dec. 62; *Ashbee v. Cowell*, 1 Busbee Eq. (N. C.) 158; *Glenn v. Clapp*, 11 Gill & J. 1, unless it is such as to create an inference of fraud. *Eberhart v. Gilchrist*, 3 Stockt. (N. J.) 170. But the Court will in some cases interfere where, in addition to an inadequate price, there has been a mistake or accident, by which the property has been sacrificed, beyond

When a person is desirous of opening a bidding, he must, at his own expense, apply to the Court, by motion,¹ for that purpose, stating the advance offered. Notice of the motion must be given to the person reported to be the purchaser of the lot, as well as to the parties in the cause.² If the Court approve of the sum offered, the application will be granted, and, on the order being drawn up, entered, and served, a new sale must be had before the Master.

The order is, in general, drawn upon the condition that the party applying do immediately pay the deposit.³ He must also bear the expense of paying in his deposit, and pay the costs of the first purchaser. When the first purchaser has paid in his money, and the purchase-money or any part of it has not been laid out, he must pay interest at the rate of four per cent on the money, or such part of it as the Master shall find to have lain dead.⁴ When, however, the purchase-money has been laid out at the instance of the purchaser, he must take back the stock, whether the funds have fallen or risen since the investment.⁵ The

the control of the party complaining. *Eberhart v. Gilchrist, supra*; *Campbell v. Gardner*, 3 Stockt. (N. J.) 423. Where the sale is made of mortgaged premises by decree of the Court, upon an application of the mortgagee, and the mortgagee is the purchaser, the Court will regard an application for a resale with greater indulgence than when a stranger is the purchaser. *Campbell v. Gardner, supra*. Surprise is one of the grounds on which the Court interferes, and orders a resale, when the property has been sacrificed. But the Court will not generally interfere, where the surprise is owing to the negligence of the party complaining, and might have been avoided by ordinary prudence and attention on his part. *Parkhurst v. Cory*, 3 Stockt. (N. J.) 233. Upon these principles an order for resale was refused, where a party to the suit, who was entitled to the surplus money on a sale of mortgaged premises, was so far deprived of his eyesight as not to be able to read a newspaper, and alleged that on this account he did not see the advertisement of the sale, and that in consequence of his absence from the sale the property was sold at a sacrifice. *Ib.*

A sale will not be opened for a party who has notice of a suit, on any ground which might have been interposed as a defence, unless the party was prevented making it by fraud or mistake. *Hall v. Urquhart*, 3 Stockt. (N. J.) 318.

¹ But where the application to set aside a sale was made on account of a fraudulent combination to suppress competition, it was held that it should be done by original bill setting forth the grounds, and not by mere suggestion or motion, especially after the sale had been confirmed. *McMinn v. Phipps*, 3 Sneed (Tenn.) 196.

² 1 Sugd. V. & P. 66.

³ Anon. 6 Ves. 512; *Young v. Teague*, 1 Bailey Ch. 13.

⁴ 1 Sugd. V. & P. 66.

⁵ *Ibid.* 71; ante, p. 1283.

applicant must also, if the estate has been sold in several lots, and he applies to have it resold in one lot, pay the original purchasers any charges and expenses they may have been put to, in having surveys made, &c., preparatory to the bidding.¹

When biddings are opened and a resale takes place, the person at whose instance the biddings were opened will, if he is outbid at the resale, be discharged, and will be entitled to receive back his deposit ;² but he will not be entitled to an allowance for his costs, as they are in the nature of a premium paid by him for the opportunity of bidding.³ Where, however, the biddings have been opened for the express benefit of the family, costs have been allowed.⁴

Sales by Private Contract.

It has been stated, that where an estate is sold by order of the Court, the sale is generally effected by public auction ; the Court will, however, where it is for the interest of the parties, depart from its usual course and allow of the property being disposed of by private contract ; it is, however, to be observed, that where there has been a decree for sale before the Master in the ordinary form, the parties will not be at liberty to depart from that form, without an order to warrant it ;⁵ and, it seems, that if an estate directed to be sold before a Master, is sold by private contract, or in any other manner contrary to the order of the Court, and not actually conveyed to the purchaser, the Court will not take notice of the sale, but will direct the estate to be sold before the Master according to the decree.⁶

The proper course for an individual to pursue who is desirous of purchasing, by private contract, an estate which has been directed to be sold before the Master to the best purchaser, is, to make a proposal to the vendor, or to the plaintiff in the cause, and to procure him, or some other party in the cause, to make an

¹ See ante, 1287.

² *Williams v. Attenborough*, T. & R. 77.

³ *Rigby v. M'Namara*, 6 Ves. 466 ; *Earl of Macclesfield v. Blake*, 8 Ves. 214 ; *Trefusis v. Clinton*, 1 V. & B. 361.

⁴ *Earl Macclesfield v. Blake*, *supra* ; *Owen v. Foulks*, 9 Ves. 348 ; *West v. Vincent*, 12 Ves. 6 ; *Trefusis v. Clinton*, 1 V. & B. 361 ; *Chapman v. Fowler*, 3 Hare, 577 ; *Filder v. Bellingham*, 1 Col. 526.

⁵ See *Annesley v. Ashurst*, 3 P. Wms. 283.

⁶ 1 Sugd. V. & P. 64.

application to the Court, for an order to refer it to the Master to inquire, and state to the Court whether it will be for the benefit of the parties interested in the estate, that his proposal should be accepted. Sometimes, in cases of this nature, a contract is actually entered into by the parties, subject to the approbation of the Master, before any application is made to the Court,¹ the advantage of which course appears to be, that a definite arrangement is entered into, subject to the Master's approval, before any expense is incurred, either before the Court or before the Master.²

Where an estate has been put up for sale in lots, and either the whole or any of the lots are unsold, the practice is to move the Court for an order, that the plaintiff may be at liberty, with the approbation of the Master, to sell, by private contract, all or any part or parts of the premises which, by the decree, were directed to be sold, which had not then been sold or disposed of, subject to such terms and conditions as the Master shall think fit. The order is drawn up in the terms of the notice, and gives the Master liberty to approve of any such contract or contracts, and to settle the conveyances consequent thereon, in case the parties differ about the same. The plaintiff's solicitor then enters into a written contract, with any person willing to purchase, "subject to the approbation of the Master." When this has been done, a state of facts, stating the contract, is carried into the Master's office, and proceeded upon in the usual manner. This state of facts should be supported by an affidavit of a surveyor, or other competent person, that the terms of the contract are fair, and that it will be beneficial to the estate that the same shall be carried into effect.

If, upon such reference, as above pointed out, the Master reports in favor of the contract, a petition must be presented and served praying that the Master's report may be confirmed, and that the contract may be carried into effect.³ The order made upon this petition usually directs all proper parties to join in and execute the necessary conveyance to the purchaser, or as he shall direct, such conveyance to be settled by the Master in case the parties differ about the same.⁴ The title is then investigated, the

¹ 2 Smith, 233, 3d ed.

² Ibid.

³ Ibid.

⁴ The deed of conveyance should be approved by the Court. *Dickerson v. Talbot*, 14 B. Monroe (Ky.) 60.

purchase completed, and the conveyance executed in the same manner as upon a purchase at a sale.¹

SECTION VII.

Master's Report.

A REPORT is "a Master's certificate to the Court how the facts or matters referred to him are or do, upon examination, appear to him, or of something of which it is his duty to inform the Court."²

Formerly there appears to have been an opinion prevalent in the profession, that there was a difference between a report and a certificate. In *Jones v. Powell*,³ Sir A. Hart, V. C. said, that the difference between a report and a certificate was, that with respect to the former, the Court had laid it down as an inflexible rule, that before exceptions could be taken to it, objections must be carried in before the Master; but that there was no such rule with respect to the latter. In *Chennell v. Martin*,⁴ however, the V. C. of England, after a very careful investigation of the subject, came to a different conclusion, and expressed his opinion to be that there is no distinction between a Master's report and a Master's certificate, and that Master's reports and Master's certificates are convertible terms.

Master's reports are either *general or separate*. General reports embrace the whole matter referred to the Master by a particular decree or order; but a separate report embraces only one distinct object of the reference.

Separate reports are made in cases in which it may be inconvenient to the parties to wait till the general report for the opinion of the Master, upon a particular matter before him under the decree.⁵ By the old practice of the Court, a separate report could not be made without a special direction in the decree, or special

¹ 2 Smith, 233, 3d ed.

² Prac. Reg. 377; see *Herrick v. Belknap*, 27 Vermont, 695, 696.

³ 1 Sim. 387.

⁴ 4 Sim. 340.

⁵ See *Kennedy v. Kennedy*, 3 Ala. 434.

order made upon motion or petition for that purpose, which, however, was granted for asking, at the expense of the party applying;¹ but, by the 70th Order of 1828, it is provided,

“That in all matters referred to him, the Master shall be at liberty, upon the application of any party interested, to make a separate report or reports, from time to time, as to him shall seem expedient; the costs of such separate reports to be in the discretion of the Court.”

The party desirous of obtaining a separate report, must take out a warrant to show cause why a warrant on preparing a draft of such separate report should not be issued, and, if the Master concurs in his view of the subject, the warrant issues and the separate report is prepared accordingly.² If no cause is shown upon the return of this warrant, a warrant to prepare the report must be issued and served, after which no further evidence can be received as to the matter to be comprised in the separate report.³

The form, manner of preparing, objecting, and excepting to,⁴ and confirming separate reports, are nearly the same as upon general reports, the only difference being, that when it is intended to act upon them, the cause is not set down for hearing upon further directions, as it is upon a general report, but a petition must be presented to the Court, praying such directions as arise out of the separate report.

It is to be observed, that, in order to facilitate the progress of a suit instituted for the administration of the assets of a person deceased, it is provided, by the 71st Order of 1828,

“That where a Master shall make a separate report of debts or legacies, there the Master shall be at liberty to make such certificate as he thinks fit, with respect to the state of the assets, and that every person having an interest shall, thereupon, be at liberty to apply to the Court as he shall be advised.”

The object of this order, is to enable the parties, when it shall appear that the funds are more than sufficient to satisfy debts and legacies, to make such applications, with regard to the residue of

¹ 2 Harr. ed. Newl. 478.

² 3 Smith, 171, 3d ed.

³ Ante, p. 1179.

⁴ Where a party to a suit objects to a separate report, he must except to it in the usual manner, and cannot proceed by petition. *Drever v. Maudesley*, 7 Sim. 240.

the property, as their interests in it may authorize them to make without waiting till the general report. Thus, in a suit for the administration of assets, if the Master reports that there are debts due by the testator remaining unpaid, and that there is a fund available for the payment of them, application may be made to the Court, by petition, to direct the payment of the debts. So, if the Master reports that there are no debts, the individuals entitled to the residue, if they have been ascertained, may apply to the Court for a distribution of a part of the fund. It is, however, to be observed, that such a distribution ought not to be made without retaining a sufficient sum to defray the costs of the suit.

The Master having obtained all the necessary information to enable him to prepare his general report, which must comprise the conclusions which he has come to upon all the matters referred to him by the decree,¹ a warrant is, upon his intimation, taken out by the solicitor conducting the cause, underwritten thus: — “*To show cause why the Master should not proceed to prepare his report herein.*” This warrant is issued in conformity with the 67th Order of 1828, by which it is directed,²

“That the Master shall not receive further evidence, as to any matter depending before him after issuing the warrant on preparing his report, but that he shall not issue such warrant without previously requiring the parties to show cause, why such warrant should not issue.”³

After the warrant to show cause, has expired, the warrant “*On preparing the Report*” must be issued and served, which operates, as we have seen, by way of bar, to further evidence.

By one of Lord Coventry’s Orders, after stating “that the Masters of the Court do sometimes, by way of inducement, fill a leaf or two of the beginning of their reports, and sometimes more, with a long and particular recital of the several points of the order of reference,” it is ordered, “that they shall forbear such iterations, the same appearing sufficiently in the order, and without any other repetition than this, ‘according to an order, or by

¹ Beames’s Ord.

² See *Colding v. Badger*, 3 Rich. Eq. 368.

³ As a general rule, a Master should not hear further testimony, after the parties have seen the draft of his report. *Tyler v. Simmons*, 6 Paige, 127. Still a Master may, at any time before the final settlement of his report, upon a reference, grant a rehearing upon the discovery of proof subsequently to the previous hearing. *Rattison v. Hull*, 9 Cowen, 747.

the direction of an order, of such a date,' shall fall directly into the subject-matter of their report, setting down the same clearly, but as briefly as they can, for the ease both of the Court and parties." ¹

This Order, however, so far at least as restricts the recitals of the points of the order, in the commencement of the decree, is generally observed; but it is the practice of the Masters, in their reports, to specify the particular head of each direction contained in the order separately, and then to dispose such direction before he proceeds to report upon another. This method of preparing reports is most useful, since it keeps all the separate subjects of reference distinct from each other, and enables the Master to give his conclusions upon each other in a clear and distinct form. And it is to be remarked, that great care is necessary in preparing a report to dispose of all the matters which have been referred, either by findings of the Master upon each section of the decree, or by pointing out what matters of reference have been waived; ² and, where a separate report has been made, it will be necessary to allude to it in the general report, specifying the particulars of it; so that the Court may see that all the inquiries directed by the decree, have been, in some way or other, disposed of by the Master. ³

The Master, however, must not go beyond the matters referred to him, and it is laid down, in one of Lord Bacon's Orders, ⁴ that if a Master reports as to matter which is not referred to him, his report, so far as relates to that matter, is a nullity. ⁵ It has been decided, that in such a case the proper course is, not to except to

¹ Beames's Ord. 81.

² Bennett, 18.

³ Ibid.

⁴ Beames's Ord. 23.

⁵ *White v. Walker*, 5 Florida, 478; *Gordon v. Hobart*, 2 Story C. C. 243; *Levert v. Redwood*, 9 Porter, 79. A Master, in stating an account, must conform to the directions of the decree; and he cannot hear evidence which, if it had been before the Court, would probably have changed the complexion of the decree; nor can such evidence be noticed on appeal. *Maury v. Lewis*, 10 Yerger, 115.

The Master should not hear evidence on matters not put in issue by the pleadings. *Ward v. Jewett*, Walk. Ch. 45; *Gordon v. Lewis*, 2 Story C. C. 260, 261. The consent of the parties will not confer on the Master any authority to examine into matters *dehors* his commission. *Gordon v. Hobart*, 2 Story C. C. 261.

the Master's report, but, before it is confirmed, to apply to the Court, that it may be referred back to the Master to review his report, but that, if no such application is made, and the report should be confirmed, the Court will pay no attention to it, except so far as it is warranted by the decree.¹

It may be stated, with reference to this part of the subject, that no exceptions will lie to a Master's report, upon the ground that he has introduced irrelevant matter, and that, where exceptions were taken, because a Master had set forth in his report certain parts of an affidavit, and had annexed to his report certain schedules and inventories, which it was insisted upon were irrelevant, and occasioned great and unnecessary expense, Sir J. Leach, M. R., would not permit the exceptions to be argued.²

The 48th Order of August, 1841, directs, "That in the report made by the Masters of the Court, no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the Court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in and used."³

According to Sir J. Wigram, V. C.,⁴ there is nothing in this Order to prevent the Master from finding facts from the evidence before him, and stating those facts in his report, or from stating the reasons upon which he has proceeded in making his report; or from submitting any question to the Court upon which the powers with which he is armed do not enable him to come to a satisfactory conclusion; or, generally, from giving the Court an account of the effect produced upon his own mind by the proceedings before him.⁵ There is nothing in the 48th Order to prevent

¹ *Jenkins v. Briant*, 6 Sim. 605. A reference to the Master will not authorize a report by him more extensive than the allegations and proofs warrant; and a report which is erroneous on its face may be inquired into without any exception taken. *Levert v. Redwood*, 9 Porter, 80. See *Gordon v. Hobart*, 2 Story C. C. 243; *Harris v. Fly*, 7 Paige, 421.

² *Rufford v. Bishop*, 5 Russ. 347.

³ This Order has been adopted in the 76th Equity Rule of the United States Courts.

⁴ *Meux v. Bell*, 1 Hare, 93.

⁵ But it is improper for a Master, in his report, to argue the case upon its merits. His province is to report facts for the information of the Court, not arguments. *Jackson v. Jackson*, 2 Green Ch. 96.

the Master doing any of these things; the Order only rejects the practice of stating and reciting in the report the documents mentioned in the Order. According, also, to the V. C. of England,¹ the real object of the Order was not to direct the Master to omit from his report the statement of the grounds on which he proceeded; but to leave that as it formerly was, and to make this additional circumstance necessary; that when the Master does state the grounds on which he came to the conclusion, he shall also state the evidence from whence he deduces these grounds.

It may also be observed, that the Order does not prohibit the Master from stating or reciting wills, deeds, and many other documents. That, according to Sir J. Wigram, V. C. was done advisedly, because wills, deeds, and many other documents, being the private property of parties which they have a right to keep in their private custody, do not remain in the office to be referred to after the report is made, whereas states of facts, charges, and the other matters specified in the 48th Order remain in the office.

Generally speaking, it is the duty of the Master to meet all the difficulties that may arise in the discharge of his office. In some way or other, he must so provide as that all the accounts and inquiries, directed by the decree, shall be fully taken;² at least it is the Master's duty to go on with them, until he finds a difficulty arising from want of sufficient powers, and then an application must be made to the Court, either by the Master or by the parties, to do that which is necessary in order to supply the defect of his authority.³ A motion, however, cannot be made for the purpose of getting the Court to point out to the Master the form in which he is to make his report.⁴

When the Master is directed to ascertain a fact, he must not content himself with stating these circumstances and leaving the Court to draw its own conclusion, but he must draw the conclusion himself,⁵ and if he does not do so, either party is at liberty to

¹ *In re Grave*, 10 Sim. 574.

² See *Paynter v. Houston*, 3 Mer. 302.

³ *Ibid.*

⁴ *Agar v. Gurney*, 2 Mad. 389.

⁵ See *Pilkinton v. Cotten*, 2 Jones Eq. (N. C.) 238; *Colding v. Badger*, 3 Rich. Eq. 368; *Burroughs v. McNeill*, 2 Dev. & Bat. Ch. 297; *Herrick v. Belknap*, 27 Vermont, 694 to 696. It is the duty of the Master to obey the instructions of the Court appointing him; and if he disregards the instructions of the Court, or does not furnish in his report the facts necessary to enable the Court to

except to the report for not having stated that conclusion for which the party objecting contends.¹

It may be mentioned here, that, even when the evidence is such that it is impossible to arrive at any degree of certainty upon it, yet, if it is sufficient to afford a reasonable ground of presumption one way or the other, the Master is bound to find in favor of such presumption.² The Master, however, is not bound to state inferences of law arising from the facts before him; and where facts are so clearly stated in a report, as necessarily to involve a particular consequence, it is for the Court to act upon the facts so reported; and it would not be a proper ground of exception, that the Master had omitted to point out the consequence.³

It is not, indeed, the general practice, unless in particular cases, for the Master, upon references to inquire into facts, to state the special circumstances of the case in his report, unless he is expressly directed to do so.⁴ By Lord Clarendon's Order to proceed to a final decree on the merits of the case, the report should be set aside, even if no objections are taken to it. *Lang v. Brown*, 21 Alabama, 179.

¹ *Winter v. Innes*, 4 M. & C. 104; and see *Lee v. Willock*, 6 Ves. 605; *Dixon v. Dixon*, 3 Bro. C. C. ed. Belt, 510; *Matter of Hemiup*, 3 Paige, 305; *Mott v. Harrington*, 15 Vermont, 185. But where a matter of fact, depending upon conflicting evidence, and the credibility of witnesses, has been referred to a Master, his decision will not be interfered with, on his mere judgment of facts, unless it is a very plain case of error or mistake. *Izard v. Bodine*, 1 Stockt. (N. J.) 309; *Sinnickson v. Bruere*, 1 Stockt. (N. J.) 659; *Merriam v. Baxter*, 14 Vermont, 514. See *Sparhawk v. Wills*, 5 Gray, 423; *Adams v. Brown*, 7 Cushing, 222; *Reed v. Reed*, 10 Pick. 398, 400; *Howe v. Russell*, 36 Maine, 115; *McKinney v. Pierce*, 5 Ind. (Porter,) 422.

And in Connecticut, questions of fact decided by a committee in Chancery, which is treated as a mere arm of the Court, and as holding the place of a Master in Chancery, will not be reviewed by the Court upon a remonstrance detailing the whole evidence. And the finding of facts by such committee cannot be impeached, upon a remonstrance, by showing that the evidence on which it was made was procured by bribery and corruption; the remedy in such case being by an application to the committee for a further hearing, or to the Court for a new trial. *Ashmead v. Colby*, 26 Conn. 289, 312, 313. The Court, in this case, treated an objection, that the whole evidence before the committee was insufficient to justify their finding, as an evasion of the rule that the finding of a committee in Chancery is conclusive upon all matters of fact found by them. *Ib.*; *Holabird v. Burr*, 17 Conn. 563. But see *Sparhawk v. Wills*, 5 Gray, 423.

² See *Fenner v. Agutter*, 1 M. & K. 120.

³ Per C. C. Pepys, M. R., *Bick v. Matley*, 2 M. & K. 312; see *Matter of Hemiup*, 3 Paige, 305.

⁴ Post, 1301, notes; *Mott v. Harrington*, 15 Vermont, 185. The report of a

ders,¹ the Masters are not, upon the importunity of counsel, how eminent soever, or their clients, to return special certificates, unless they are required by the Court to do so, or that their own judgment, in respect of difficulty, leadeth them to it, such kind of certificates, for the most part, occasioning a needless trouble rather than ease to the Court, and certain expense to the suitor. It is to be observed, however, that, under this Order, considerable discretion is left to the Master, and that notwithstanding it, he may, and frequently does, state special circumstances in his report, without any specific order to warrant it.² It is, nevertheless, frequently the practice, where it is apprehended that particular circumstances may come out upon inquiries before the Master, which may influence the opinion of the Court, when the cause comes on upon further directions, to ask, at the hearing, for a specific direction in the decree or order, that the Master may be at liberty to state special circumstances;³ under such a direction, however, the Master must not set forth the evidence with his opinion upon it, but he should state the matter of fact, for the judgment of the Court, in the same manner as in Courts of Law; — they only state the facts allowed by both sides, in a special verdict, but never meddle with any part of the evidence on either side.⁴

Master, "that it would be for the interest of the defendants to sell the estate in separate lots, if the premises can be conveniently divided," is not sufficiently definite to be the foundation of a decree for the sale of the mortgaged property. *Weller v. Hallett*, 1 Ala. 379. The report should have stated whether the property was susceptible of division; which portion it was for the interest of the defendants should be sold; and should also have contained the evidence on which the report was founded. *Ibid.*; *Anon.* 1 Clarke, 423.

¹ Beames's Ord.

² 2 Atk. 620; *Champernowne v. Scott*, 4 Mad. 209; but see *Ganderton v. Ganderton*, 13 Sim. 182.

³ *Seton on Decrees*, 24; *Jackson v. Jackson*, 2 Green Ch. 96, 100.

⁴ *Duchess of Marlborough v. Wheat*, 1 Atk. 454. Where it is referred to a Master to examine and report as to particular facts, or as to any other matter, it is his duty to draw the conclusions from the evidence before him, and to report such conclusions only; and it is irregular and improper to set forth the evidence in his report, without the special direction of the Court. *Matter of Hemiup*, 3 Paige, 305; *Mott v. Harrington*, 15 Vermont, 185; *Goodman v. Jones*, 26 Conn. 264. See *Johnston v. Reardon*, 1 Moll. 54; *Herrick v. Belknap*, 1 Willams (Vt.) 673; *Gilmore v. Gilmore*, 40 Maine, 53. Where the Master incorporates the evidence into his report, without the special direction of the Court, although it is done upon the solicitation of counsel, he will not be allowed for it on the taxation of his costs. *Matter of Hemiup*, *supra*. But if the conclusion which he is to

But, although the Master does not, unless under special circumstances, detail the evidence upon which he proceeds in making his report, yet he generally refers to it, either in the body of his report, or in a schedule annexed to it.¹ When he reports upon accounts, he generally states the results of the accounts in the body of the report, and refers to schedules as to the particular items. These schedules must be annexed to the report and filed with it, and it will not be sufficient that they should be entered in a book kept in the Master's office, in the same manner as the accounts of receivers.²

draw is a question of law, and not a mere legal presumption of a fact, he is permitted, in the exercise of a sound discretion, and without an order for that purpose, to make a special report submitting the legal question to the decision of the Court. *Matter of Hemiup, supra.*

¹ Sometimes orders direct the Master to report the testimony; sometimes to report it if either party requires him to do so. In these cases the testimony should be annexed, certified by him, but not embodied in the report. 1 Hoff. Ch. Pr. 545; *Matter of Hemiup*, 3 Paige, 305; *Mott v. Harrington*, 15 Vermont, 185. See *Anon.* 1 Clarke, 423. But either party may apply to the Master for certified copies of the testimony to be used upon the argument of exceptions to the report. 1 Hoff. Ch. Pr. 545. A party should require the Master, or Auditor, to report specially such evidence as furnishes the ground of any exception. And the Court will not open the facts of the report, unless to correct some unquestionable error. *Donnell v. Columbian Ins. Co.* 2 Sumner, 366; *Sparhawk v. Wills*, 5 Gray, 423.

In Vermont, it is held, that the testimony given *viva voce* in taking an account, or a copy of it, should be returned into Court by the Master with his report. *Herrick v. Belknap*, 1 Williams (Vt.) 673. And in Maine, in *Gilmore v. Gilmore*, 40 Maine, 53, the Master was directed by the Court to report in full the evidence produced before him, and his decisions thereon. But without such order the Master is not bound to report the evidence upon which his determination is founded. *Howe v. Russell*, 36 Maine, 115; see *McKinney v. Pierce*, 5 Ind. (Porter) 422; *Mott v. Harrington*, 15 Vermont, 185. In *Jackson v. Jackson*, 2 Green Ch. 96, the Master reported the evidence without any order to that effect, and upon the argument of the exceptions to the Master's report, the Court examined the evidence reported, and ordered the report to be corrected where it was found erroneous, without sending it back to the Master.

² *Smith v. Smith*, 2 Dick. 789. For the convenience, however, of suitors wishing to refer to accounts taken in the Master's office, it is provided, by the 62d Order of 1828, "That all such accounts, when passed and settled by the Master, shall be entered in a book, to be kept for that purpose in the Master's office, as is now the practice with respect to Receivers' accounts, and with proper indexes, in order to be referred to as occasion may require." When a report is made upon accounts exhibited to the Master, such accounts should accompany the report, that the Court may see the correctness of the Master's inferences. *Jeffreys v. Yarborough*, 2 Hawks, 307. See *Mitchell v. Walker*, 2 Ired. Ch. 621. The

When the Master has prepared his report, an intimation of his having done so is given to the solicitor for the party conducting the cause, (who has, generally, bespoken a copy of the draft report,) that the draft report is ready. Any party, however, may apply to the Master to make his report,¹ and when the draft is prepared, a warrant must be taken out and served upon all parties *active* in the suit, underwritten — “*The Master has prepared the draft of his general [or separate] report.*”² This is done for the purpose of informing the parties that the report is ready.

Upon the service of this warrant, the parties requiring it must procure, from the Master's clerk, a copy of the draft report, or of such part of it as affects their interests.³ And the party conducting the cause must take out and serve, successively, warrants “to *proceed upon*” and “to *settle*” the draft report.⁴

Upon attending the warrant, to settle the draft report, the solicitors for the several parties should suggest to the Master such alterations as in their judgment they may think proper.⁵

When all the alterations and suggestions of the parties have been submitted to the Master and disposed of, the Master finally settles the draft of his report, from which the Master's clerk makes a transcript or engrossment upon paper, which must be carefully examined by the solicitor for the party taking the same, and compared with the draft as settled by the Master.⁶ After this has been done, another warrant must be taken out and served, underwritten — “*at which time the Master will sign his general [or* Master should state the account at length, and all the facts found by him, so that they will be intelligible without reference to the testimony. *Herrick v. Belknap*, 1 Williams (Vt.) 673. His report should so present the items that exceptions may be taken to it. *Ransom v. Davis*, 18 Howard (U. S.) 295. It should contain a succinct statement of all the points made by counsel, and the facts found by him upon such points. *Herrick v. Belknap*, *supra*. The report of a Master, stating the accounts of a mercantile firm, should show whether the partnership resulted in a profit or loss, and to what extent, and should also dispose of the uncollected dues. *Zimmerman v. Huber*, 29 Alabama, 379.

¹ Turn. & V. 428.

² *Ibid*.

³ Formerly, no party could attend the Master upon the draft report, who had not taken a copy of it; but this is now altered. See ante, p. 1152.

⁴ 1 Turn. & V. 428, the warrants may be taken out by any of the parties, but they are usually taken out by the plaintiff's solicitor, unless the conduct of the cause has been taken from him. See ante, p. 1142.

⁵ See *Remsen v. Remsen*, 2 John. Ch. 495.

⁶ 1 Turn. & V. 429.

separate] *report herein.*" This is called the warrant on signing the report, and must be served upon the parties so as to give them three clear days between the service and the day for attendance, that is, three days, of which neither the day of service nor the day of attendance is reckoned as one ;¹ the object of this delay being to afford the parties time to bring in objections to the draft report, if they shall be so advised. If, upon the return of this warrant, no objections are brought in, or time for bringing in objections applied for and allowed, the Master proceeds to sign the transcript, and then the report is in a complete state and ready for filing.²

The object of allowing the interval of three clear days between the service of the warrant on "signing the report," and the time appointed for the attendance upon such warrant, is, as has been stated, to allow parties who are dissatisfied with the Master's judgment, an opportunity of stating their objections to it in writing. The reason for the adoption of this proceeding, is thus stated by Lord Chief Baron Gilbert.³—"The ancient rule was, that the party should never except, but where he had first objected to the draft of the report before the Master ; and, where there was no objection brought in, it was allowed as good cause to discharge the exception ; and it were to be wished that this good rule was strictly followed, since, if the party had objected, he might have showed the Master his error, and the report would have been altered in that particular, and never troubled the Court. Whereas it often happens, that the party will conceal some material objection and keep it *in petto* from the Master ; and when this comes on by way of exception, it makes a variance in the report."

The rule mentioned by the Lord Chief Baron, was promulgated by Lord Keeper North, in 1683,⁴ and is in fact, with little variation, the rule of the Court at the present time ; the practice of the Court requiring that, as to all references to a Master, of such a nature that his report thereupon is to be made the foundation of a further decree or decretal order, no party is at liberty, without a special order, to except to the report, or present a petition in the nature of an exception thereto, unless he has, previously to the

¹ Ante, p. 1145. This is sometimes termed a four-day warrant, reckoning the day of attendance as one of the days.

² 1 Turn. & V. 428.

³ For. Rom. 167.

⁴ Beames's Ord. 259.

Master signing the report, carried in objections, in writing, to the draft report, specifying the points in which he considers the report to be wrong.¹

Objections to a draft report are generally, though not necessarily, drawn by counsel, but are not signed by him; and as they are to serve as the foundation of future exceptions, they are generally the same in form and substance as the exceptions proposed to be taken.

Although the objections ought, in strictness, to be taken in the period between the service of the warrant upon the signing the draft report and the return of such warrant, yet the Master will, upon a proper case being submitted to him, allow further time for bringing in the objections.²

To obtain such further time, a warrant should be taken out and served before the return of the warrant to sign the report, and, on the attendance upon such warrant, a reasonable time, commensurate with the specialties of the case, will be given by the Master, to prepare and bring in the objections.³

If a person interested in the report, though not a party to the suit, is dissatisfied with it, he must leave objections to the draft as a preliminary step to putting himself in a situation to take exceptions; thus, creditors and other persons coming in under decrees, and who have had their claims allowed, must, if they mean to except to the report, carry in their objection to the draft in the same manner as parties to the record.

So, also, persons who have carried in claims as creditors or next of kin, under decrees, but have had their claims disallowed, ought

¹ *Pennington v. Lord Muncaster*, 1 Mad. 555; *Orley v. Pensam*, 1 Hare, 322. Exceptions are always to be confined to objections allowed or overruled by the Master. *Copeland v. Crane*, 9 Pick. 73, 78; *Byington v. Wood*, 1 Paige, 45; *Iaeger v. Bossieux*, 15 Grattan (Va.) 83; *Gordon v. Lewis*, 2 Sumner, 143. See *Method. Epis. Church v. Jaques*, 3 John. Ch. 81; *Lewis v. Lewis*, 1 Ala. 35; *Story v. Livingston*, 13 Peters, 359; *Frith v. Lawrence*, 1 Paige, 434. "Exceptions are to be regarded so far only as they are supported by the special statements of the Master, or by evidence which ought to be brought before the Court, by reference to the particular testimony on which the party excepting relies." *Rice J.*, in *Miller v. Whittier*, 36 Maine, 585. Objections to the admission of evidence should be made at the time, or the objection cannot be raised by excepting to the allowance of the item proved by that evidence. *Taylor v. Kilgore*, 33 Alabama, 214.

² 1 Turn. & V. 430. See *Byington v. Wood*, 1 Paige, 145.

³ *Ibid.*

also, if they intend to dispute the Master's finding, to be prepared with objections to the draft report in order to gain a right to except to it.¹

It is to be observed, that the object of requiring a party to deliver objections before he can except to the report, is that the Master may have an opportunity of reconsidering his opinion,² and that, when they are left, the usual warrants "on leaving" and "to proceed" should be served on the parties.

If, after considering the objections, the Master maintains his original opinion, he signs the report as it stands. If he changes his opinion, he alters the draft of his report accordingly, after which a fresh warrant "on signing" must be served, in order to afford the other party an opportunity of carrying in fresh objections to the altered draft.³

The Master's report having been signed, it should be forthwith filed in the Report Office, and an office copy thereof taken by the party filing it.⁴ By an old Order,⁵ this should be done within four days after the signature, but it is considered sufficient if it be filed at any time before any proceedings are taken or order made thereon.⁶

After the report has been filed, the question arises whether it is one of such a nature as to require confirmation by the Court, or whether it is final and complete without such confirmation; according to Sir J. Wigram, V. C., the answer to this question depends

¹ See *Walker v. Wingfield*, Reg. Lib. 1809, fo. 10; and *Ker v. Cloberry*, Reg. Lib. 1812, A. 734.

² *Bowker v. Nickson*, 3 Mad. 439.

³ *Richardson v. Horton*, 5 Beav. 87.

⁴ *Bennett*, 22.

⁵ *Beames's Ord.* 292.

⁶ See ante, p. 1157, n. (1). In the United States Courts, the Master, as soon as his report is ready, shall return the same into the Clerk's office, and the day of the return shall be entered by the Clerk in the Order Book. Equity Rule, 83. The compensation to be allowed to every Master in Chancery for his services in any particular case, shall be fixed by the Circuit Court in their discretion, having regard to all the circumstances thereof; and the compensation shall be charged upon and be borne by such of the parties in the cause as the Court shall direct. The Master shall not retain his report as security for his compensation; but when the compensation is allowed by the Court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the Court. Equity Rule, 82.

upon the terms of the order, or the nature and subject of the reference, and not upon the proceeding on which the reference is made.¹

So that on the one hand there are some reports made under decrees which do not require confirmation; and on the other hand there are some reports made upon motions or petitions, which must be regularly confirmed. In the case of *Empringham v. Short*,² the V. C. of England stated, that he had had a conversation with the Registrar on the subject; and that he found that it was difficult to determine by any general rule which are the reports which this Court requires to be confirmed, and what are those which are taken to be sufficient for the Court to act upon, though they be not confirmed.

In the case before him, on a motion to commit a defendant for contempt, the defendant undertook to make reparation for the act complained of. Whereupon the Master was directed to inquire what reparation the defendant ought to make, and he was ordered to make such reparation accordingly. The V. C. of England thought the report made upon the order was one that required confirmation before the Court could act upon it. But Lord Cottingham held otherwise, considering the order of the Court final, as it directed the defendant to make the reparation, when the amount should be ascertained by the Master.

It would seem, therefore, that wherever the discretion of the Court is exercised upon the first Order, and where the Master is only called upon to perform some act, or make some inquiry necessary for carrying out the order which the Court has made, the report of the Master will not require confirmation.

Thus, all reports made by the Master, confined to such facts as of his having appointed trustees, approved a conveyance or settled interrogatories for the examination of parties, or of his having ordered the production of documents pursuant to a decree, and that the documents ordered to be produced, were either produced or not produced before him, do not require confirmation. So the Master's report upon exceptions for scandal or insufficiency, does not require confirmation.³

¹ *Otley v. Pensam*, 1 Hare, 235.

² 11 Sim. 78.

³ A Master's certificate as to the insufficiency of an examination of a party on interrogatories, also, does not require an order of confirmation. *Case v. Abeel*, 1 Paige, 630.

There is, however, one report of the nature last mentioned, which is an exception to the rule, as it does require confirmation by the Court; namely, a report of a person being the purchaser of a lot at a sale, before the Master, with respect to which it is to be observed, that the object of requiring this report to be confirmed is not to enable the parties to bring the decision of the Master under the review of the Court, but to afford time between the service of the order *nisi*, and the absolute confirmation of the report to others to come in and open the bidding, so as to secure the sale of the estate to the best possible advantage. This exception, therefore, depends upon a particular reason, and does not interfere with the rule, which renders the confirmation of such reports as are not intended to be made the foundation of any future discretionary act of the Court generally unnecessary.

On the other hand, where the report is required for the purpose of enabling the Court to make some discretionary order or decree, whether the order directing the reference be made upon decree, or upon any interlocutory application, the report requires confirmation before it is adopted as the foundation of such future order or decree.

Although, in determining the question, whether a report of the Master does or does not require confirmation, it is immaterial whether the order of reference was made by decree or upon an interlocutory application, yet supposing it to be such a report, as from its nature requires confirmation, there is a difference in the mode in which, in the two different cases, the confirmation of the Court is obtained.

If a reference is made at the hearing of a cause, or upon further directions the proceedings to confirm the report is by a motion *nisi*,¹ upon which an order is made that the report, and all the matters and things therein contained, do stand satisfied and confirmed, &c.; unless the defendant having notice thereof, shall within eight days after having such notice, show unto the Court good cause to the contrary.²

This order may be obtained, by motion of course, or by petition at the Rolls,³ by any of the parties, though it is usually taken by the plaintiff or party taking the report. When, however, a party,

¹ *Ottey v. Pensam*, 1 Hare, 324.

² Hand. 169.

³ 21st Order, 1828.

who does not take the report, proceeds to confirm it, he should give the party, taking the report, notice, that, unless such party moves to confirm the report within a given time, he shall do it.¹ It is said, also, that, where a Master makes a separate report of a creditor's claim, the creditor may obtain the order to confirm the report.²

The circumstance of obtaining an order to confirm a Master's report *nisi*, does not preclude the party taking it from afterwards excepting to the report; and the time within which this may be done is unlimited till the order to confirm absolute is made; but it may be limited by an order *nisi*, to be obtained by any other party, on the neglect of the party having the carriage of the report.³

In a recent case,⁴ after the Master had made his report, the plaintiff excepted to so much of it as allowed certain payments made by the defendant, but neglected to obtain the usual order to confirm the report *nisi*, before filing his exceptions. The exceptions came on to be argued and were allowed, and it was referred back to the Master to review his report, upon which the Master made his further report, and the plaintiff obtained an order *nisi* to confirm it. As no order *nisi* to confirm the first report had been obtained, it was considered necessary also to confirm so much of the original report as had not been excepted to, and the plaintiff applied, as of course, for an order *nisi* for that purpose, which the Registrar declined to draw up without the sanction of the Court; whereupon the plaintiff made a motion, at the Rolls, for an order *nisi* to confirm so much of the Master's report as the plaintiff had not excepted to, and the order was made in those terms.

It may be mentioned here, that although creditors who have come in before the Master, and have had their claims allowed, are frequently most materially interested in the report, it is not usual to serve them with the order for confirming it *nisi*; and that, of course, where persons have come in as creditors, but have not succeeded in establishing their claims, they are never served with such order. In no case is personal service requisite.⁵

¹ 2 Smith, 383, 3d ed.; and Shirley v. Earl Ferrers, MS. cited ib.

² Gibbons v. Caunt, MS. cited ib.

³ Richardson v. Horton, 5 Beav. 87.

⁴ Robinson v. Wood, Rolls, 16th Dec. 1839, *ex relatione* Faber.

⁵ 21st and 44th Orders of 1828, ante, pp. 445, 466.

A copy of the order *nisi* having been served upon the solicitors for the different parties, an affidavit of such service must be made and filed, and then, if no cause is shown within eight days, the party is entitled to move as of course, after the expiration of those eight days, to make the order *nisi* absolute.¹

It appears that now the order for confirming the report absolutely, may be obtained on any day, as well in term as out of term.²

The usual cause shown against making the order *nisi* for confirming the Master's report absolute, is the filing of exceptions to the report,³ and the setting of them down to be argued ;⁴ but it is to be observed, that there must be an order for setting the exceptions down for argument actually entered and served, and that the mere filing of exceptions and paying the deposit will not be sufficient.⁵

An order to review the report, which is sometimes, though very rarely, granted upon application after the order *nisi*, may, also, be shown, as cause against confirming it absolute.

If, for any reason, a party is desirous of enlarging the time for confirming the report absolutely, he should make a special application to the Court by motion.⁶

The application for the order to confirm the Master's report absolute must be by motion, and cannot be by petition at the Rolls, the 21st Order of 1828, which authorizes the granting the order *nisi* upon petition, not extending to the order absolute. It must be supported by an affidavit of service of the order *nisi*, and by the Registrar's certificate of no cause having been shown. The order confirming a report absolute requires no service.⁷

If the plaintiff after obtaining the order *nisi* to confirm the Master's report does not proceed to make it absolute, the defendant may move to confirm the report ; and for that purpose the certificate of no cause shown will be ordered to be entered on his office copy of the order *nisi*.⁸

¹ For the manner of computing the period, see ante, p. 360.

² Lord Harborough *v.* Wartnaby, 1 Ph. 364.

³ See *Mechanics' Bank of Phil. v. Bank of N. Brunswick*, 2 Green Ch. 439 ; *Brundage v. Goodfellow*, 4 Halst. Ch. (N. J.) 513.

⁴ *Gildart v. Moss*, 4 Ves. 617.

⁵ *Ibid.* ; see also, *Hall v. Mulliner*, 2 Dick. 604 ; *Abel v. Nodes*, *ibid.* 730 ; *Mole v. Smith*, 1 J. & W. 670.

⁶ See *Hand*, 169.

⁷ 2 Smith, 386, 3d ed.

⁸ *Roberts v. Williams*, 2 Hare, 151.

It has before been stated, that there is a distinction between the manner of confirming some reports, and that of confirming others. Those reports which are founded on decrees or decretal orders, must be confirmed by orders *nisi* absolute, made upon motion, in manner last stated ; whilst those reports, which are the consequence of orders made upon a motion or petition, are confirmed by motion or petition absolutely.¹

Of this description are reports as to the propriety of granting leases of property under the control of the Court, or as to the approval of contracts for the purchase of property with funds in Court. Of the same nature, also, are reports of the allowance of maintenance or guardians for infants, where the application for the maintenance or guardians has been made to the Court in the form of a summary petition, though the form of confirming such report would be different, if the order for the approval of the maintenance, &c., should be made upon decree.²

Reports of this description must, as has been stated, be confirmed by petition, which generally prays, besides the confirmation of the report, such consequential directions as arise out of it. On hearing these petitions, the Court will take into consideration any objections which may arise upon the report, provided they are sufficiently raised by it to enable the Court to dispose of them. In cases, however, where the objection is not on the face of the report it is necessary to present a petition to raise the point, praying that the Master may review his report, and this, it seems, is the correct mode of exceptions to this class of reports.³

It may be observed, that Mr. Smith, in the last edition of his Treatise, remarks, with respect to these reports made upon interlocutory applications, that "the present practice of combining in the same petition a prayer to confirm a Master's report (which

¹ Ottey v. Pensam, 1 Hare, 324.

² See Cavendish v. Mercer, 5 Ves. 195, *notis*. It is to be observed, that in the principal case, Greenwell v. Greenwell, *ib.* 194, Lord Loughborough is reported to have noticed, that in Cavendish v. Mercer, the report was confirmed upon motion, and have observed, that the practice of confirming these reports, upon motion, is irregular ; — perhaps his Lordship did not advert to the distinction above pointed out, and to the fact that, in Cavendish v. Mercer, the direction for the inquiry as to the maintenance was made by decree, whereas, in general, applications for maintenance, &c., are made by petition in a summary way.

³ Ottey v. Pensam, *supra* ; and see Hodge v. Rexworthy, 6 Jur. 701, S. C. ; 7 Jur. 292.

ought to be confirmed by order *nisi* and absolute,) and for directions consequential upon it, is not only contrary to the practice, but is attended with a great increase of trouble and expense, and may, if title is involved, lead to dangerous results." The practice is, however, recognized by Sir J. Wigram, V. C., in *Ottey v. Pensam*, and is consistent with the manner in which reports of this nature are objected to.

It may be mentioned, in this place, that it seems to be irregular to confirm a report of this nature by petition of course, even with the consent of all parties. Such a report ought to be confirmed by a special petition.¹ With respect, however, to a report that is confirmed by orders *nisi* and absolute, the adverse party may give an authority to his counsel to consent that it be absolutely confirmed in the first instance.

Exceptions to the Report.

It having been stated, that there are some reports which do not require any confirmation, and others to which it is necessary, and moreover, that of those which do require confirmation, some are confirmed by orders *nisi* and absolute, and others are confirmed usually (if not necessarily) by motion or petition absolutely. It remains to be stated, what is the proper course of excepting or objecting to these different reports.²

In the first place, with respect to those reports which do not require confirmation, it is clear that this peculiarity does not in

¹ *Bailey v. Todd*, 1 Beav. 95.

² Exceptions to a Master's report are proper only in those cases in which he has come to a wrong conclusion upon the matters which were referred to him to ascertain or decide. Where he proceeds irregularly, or neglects to report upon the matters referred to him, the proper course for the aggrieved party is to apply to the Court to set aside the report, or to refer it back to the Master, to perfect the same. *Tyler v. Simmons*, 6 Paige, 127. See *Herrick v. Belknap*, 27 Vermont, 695, 696. If a Master reports on a matter which is not referred to him, his report, so far as it relates to that matter, may be treated as a nullity. *White v. Walker*, 5 Florida, 478. See *Harris v. Fly*, 7 Paige, 421. Even the consent of the parties could not confer upon him any authority to examine into matters beyond his commission, especially where those matters are not charged in the bill, and are not put in issue by the pleadings. *Gordon v. Hobart*, 2 Story C. C. 260, 261. A Master's report cannot be excepted to for irrelevancy or impertinence. *Tyler v. Simmons*, *supra*. Exceptions should not be prolix or argumentative, but should state concisely the fault imputed to the report. *Booth v. Penner*, 1 Irish Eq. 34. See *Vereker v. Gort*, *ib.* 175.

itself preclude a party dissatisfied with them from excepting to the Master's finding.¹ In some cases, however, the only mode of obtaining the opinion of the Court upon such proceedings, is by petition praying either that the conclusion of the Master may be reviewed by the Court, or for leave to except to the report.²

It may be observed, that wherever the Master is required to make a certificate or report, which does not require any exercise of discretion or judgment, as in the case of certificates to the Court of the proceedings in his office, or of the fact of documents not having been deposited pursuant to an order, no objection or exception will be entertained by the Court.³ In fact, certificates of this description are of the same nature as the certificates of any other officer of the Court, who certifies as to a mere matter of fact belonging to his department, such as the certificate of the Accountant-General as to money not having been paid into Court, or of the clerk of Records and Writs, of documents not having been deposited with him, pursuant to an order of the Court, which certificate, if wrong in point of fact, must be quashed upon motion, not excepted to.

The certificate of the Taxing Master of the taxation of costs may be classed under this head, for as a general rule it cannot be excepted to without the special leave of the Court. This special leave is to be obtained by means of a petition setting forth the grounds of complaint, and also stating the particular charges which are alleged to be erroneous. When the petition comes before the Court, if the grounds of complaint appear to be sufficient, it is usual for the Court itself to examine and decide upon the items, but this is not an universal course of proceeding, it being quite open to the Court to give the leave which is asked to file exceptions, and to leave those exceptions to the ordinary course of inquiry and determination.⁴

¹ *Empringham v. Short*, 11 Sim. 78.

² *Ottey v. Pensam*, 1 Hare, 322; *Russell v. Buchanan*, 9 Sim. 167. Exceptions may, however, be taken to the Master's report of the sufficiency of an answer, ante, p. 771. The report of a Master upon the accounts of receivers requires confirmation, and may be excepted to. *Richards v. The Morris Canal, &c. Co.*, 3 Green Ch. 428.

³ *Kemp v. Wade*, 2 Keen, 687; *Jones v. Powell*, 1 Sim. 387.

⁴ *In re Congreve*, 4 Beav. 88; *Pitt v. Mackreth*, 3 Bro. C. C. 321; and see *Lucas v. Temple*, 9 Ves. 399; overruling a distinction taken in *Holbecke v. Sylvester*, 6 Ves. 417; see also, *Purcell v. McNamara*, 12 Ves. 170; *Fenton v.*

Again, with respect to those reports which are made in consequence of interlocutory applications, and confirmed absolutely by motion or petition, they can only be objected to at the hearing of the petition to confirm them, or upon a petition presented for the express purpose of having it referred back to the Master to review his report. Such a petition is in the nature of exceptions to the report, and Sir J. Wigram, V. C., in the case of *Ottey v. Pensam*,¹ has decided that the same rule prevails with respect to such a petition as prevails in the case of ordinary exceptions to the Master's report, namely, that no party can present such a petition unless he has previously carried in objections to the draft of the report.

Lastly, as to all reports made under decrees, and which are confirmed by orders *nisi* and absolute, any party who is interested in the motion, and who has previously carried objections into the Master's office, may file exceptions to them, and thereby subject them to the review of the Court.

It may be mentioned here, that where the Master, by his report, states all the facts correctly, but is mistaken as to the legal consequences of those facts, it is not necessary for the party dissatisfied with the Master's finding, to except to the report, as the question decided by the Master may be opened upon further directions without exceptions.² So where facts are so clearly stated in a report as necessarily to involve a particular consequence, it is for the Court to act upon the facts so reported, and it will not be a proper ground of exception that the Master has omitted to point out the consequence.³

With respect to the class of reports which require confirmation, it is to be observed, that though the rule is generally very strictly adhered to, of not permitting exceptions to be filed where there have been no previous objections;⁴ there are, nevertheless, cases

Crickett, 3 Mad. 496. — N. B. The petition usually prays that the party presenting it may be at liberty to except, *Pitt v. Mackreth*, *ubi supra*, and the Court, upon hearing the petition, usually refers it to the Master to review his report, without imposing upon the applicant the necessity of filing exceptions. See *Richards v. The Morris Canal, &c. Co.*, 3 Green Ch. 428.

¹ 1 Hare, 322.

² *Adams v. Claxton*, 6 Ves. 226. See *Branger v. Chevalier*, 9 Califor. 353.

³ *Bick v. Motly*, 2 M. & K. 312.

⁴ By the English practice, exceptions to the accounts of a receiver as stated by a Master, should be taken before the Master while the account is in his possession, and before he makes his report. This practice has been generally acted on

in which the Court will permit a departure from it. Thus, if it has been owing to accident or surprise that the objections have not been carried in, as where the clerk in Court omitted to give the solicitor notice of the warrant to sign the report, the Court permitted exceptions to be filed.¹ So where the solicitor swore, by his affidavit, that he had neglected to carry in objections, because he was not aware that it was necessary to take objections to the report in the draft, in order to enable him, on behalf of his clients, to file exceptions, an order to permit his filing exceptions, was made, although the Master's report had been confirmed *nisi*.² In *Vallence v. Weldon*,³ upon an application to take exceptions to a report, although no objections had been carried in to the draft, Sir Thomas Clarke, M. R., referred it to the Master to review his report, in order that the parties might have an opportunity of taking exceptions to it.⁴

All parties to the record who are interested in the matter in question may take exceptions to the report, and where there are several sets of parties, appearing by different solicitors, they may, if they are not disposed to join, each take exceptions, although their grounds of exception are the same.⁵ Creditors, too, who have established their claims before the Master, are permitted to except to the report, although not parties to the suit;⁶ so, also, are creditors who have preferred their claims, but have been rejected by the Master;⁷ it is necessary, however, before they do so, that they should obtain the permission of the

in New Jersey; and it is said to be beneficial, and one that might be safely pursued in all ordinary cases. But there has been no actual recognition of the rule, except in cases where a draft of the account was served, and the party omitted to make any exceptions or suggest any alterations to the Master. *Mechanics' Bank of Phil. v. Bank of N. Brunswick*, 2 Green Ch. 437.

¹ *Bowker v. Nickson*, 3 Mad. 439. See *Foote v. Van Ranst*, 1 Hill Ch. 185; *Potts v. Trotter*, 2 Dev. Ch. 281.

² *Pennington v. Lord Muncaster*, 1 Mad. 155.

³ 1 Dick. 290; 1 Mad. 340, *notis*, S. C.; see, also, *Wood v. Lambirth*, 9 Sim. 195.

⁴ Exceptions to a report upon reference to take an account are unnecessary when the Master assigns unsatisfactory reasons for his conclusions. *Hooks v. Sellers*, Dev. Eq. 61.

⁵ *Trezevant v. Fraser*, MS. 11th Jan. 1836.

⁶ *Wilson v. Wilson*, 2 Moll. 328.

⁷ See *Mechanics' Bank of Phil. v. Bank of New Brunswick*, 2 Green Ch. 437.

Court, which they may do upon motion of course, or petition at the Rolls.¹

The same thing may be done by persons, claiming as next of kin, whose claims have been disallowed by the Master,² or by a purchaser under a decree for sale in the Master's office.³

But although in the case of persons claiming as creditors, or as next of kin, or of purchasers, liberty to except to the Master's report may be granted, upon petition or motion of course, the case is not so with respect to persons who, whether parties to the suit, or claimants under the decree, have omitted to carry in objections to the draft, such persons, if they wish for the indulgence of the Court, must obtain it by means of a special application, supported by affidavit, accounting for their omission in not complying with the rules of the Court;⁴ and, from what occurred in *Vallence v. Weldon*,⁵ it may be collected, that such application should be made by motion and not by petition.

It may be mentioned here, that in *Taylor v. D'Egville*,⁶ it was held by the V. C. of England that persons who are not parties to the suit, but who had obtained leave to attend the proceedings in the Master's office, could not except to the report, unless they presented their petition stating their objections, and praying for leave to except.

Exceptions to a Master's report should not be taken till the report has been filed;⁷ afterwards, where the report is one which does not require confirmation, no time should be lost in filing them, and serving the order to set them down, before any step is

¹ Notice should be given of an application on behalf of the creditors for leave to file exceptions to the Master's report. — An order for leave to file exceptions, made without notice, was discharged, in *Richards v. The Morris Canal, &c. Co.*, 3 Green Ch. (N. J.) 428. See *Mechanics' Bank of Phil. v. Bank of New Brunswick*, *supra*.

² *Walker v. Wingfield*, Reg. Lib. 1809, B. fo. 10, cited *ib*.

³ *Ker v. Cloberry*, Reg. Lib. 1812, A. 734, cited *ib*.

⁴ See *Potts v. Trotter*, 2 Dev. Ch. 281.

⁵ 1 Dick. 290; Amb. 126, S. C.

⁶ 7 Sim. 445.

⁷ 2 Smith, 390, 3d ed. In the United States Courts the parties have one month from the time of filing the report, to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed, they shall stand for hearing before the Court, if the Court is then in session, or if not, then at the next sitting of the Court which shall be held thereafter by adjournment or otherwise. Equity Rule, 83.

taken upon the report; otherwise the excepting party may be precluded from the benefit of his exceptions; thus, in cases of exceptions to reports on the insufficiency of answers, care should be taken to file the exceptions to the Master's report and to get the exceptions set down with the usual formalities, before a subpœna has been issued for costs, or before the defendant puts in a further answer.¹

In the case of *Holmes v. The Corporation of Arundel*,² it was decided that by taking proceedings in the Master's office to expunge matters reported by the Master to be impertinent, a party adopts the report altogether, and cannot afterwards, unless by the special leave of the Court, except to it.

In the case of exceptions to a Master's report on impertinence, the exceptions ought to be filed, and the order to set them down served, before the impertinent matter has been expunged. In like manner, in all cases where the report of the Master is to serve as the foundation for a Serjeant-at-arms, or for a commitment, or other process of contempt, the exceptions to the Master's report should be filed, and the order for setting them down served, before the order *nisi* for issuing the process, has been made absolute; as, after an order *nisi* for a Serjeant-at-arms, or for a commitment or other process, has been made absolute, the party against whom it has been issued being in contempt, will not be in a situation to obtain an order for setting down the exceptions; or, if he does obtain such an order, will be liable to have it discharged. It is to be recollected that the rule which has been before laid down,³ with regard to those exceptions to a Master's report which require confirmation, applies equally to exceptions to reports which do not require it; and that the only effectual way, in the latter case, as well as in the former, to render exceptions available to suspend further proceedings upon the report, is, not only to file the exceptions and pay the deposit, but to obtain an order to set them down, and serve such order upon the other party, it being by means of such service only that the fact of the exceptions having been filed, is regularly brought to the knowledge of the party procuring the report.⁴

¹ There is no precise time for filing exceptions to the report of a Master on the insufficiency of the answer, as it does not require confirmation. *Myers v. Bradford*, 4 John. Ch. 434.

² 3 Beav. 303.

³ Ante, pp. 1312, 1313.

⁴ See *Stafford v. Rogers*, 1 Hopk. 98.

With respect to exceptions to reports that require confirmation, the proper time for filing exceptions to them, is after service of the order for confirming them *nisi*, and before such order is made absolute; and it is to be recollected, that, even where the party who intends to except, is the person taking the report and having the conduct of the cause, it is right that he should, before filing his exceptions, obtain and serve the order for confirming the report *nisi*, and that his right to except will not be thereby prejudiced.¹

But although the Court is, in general, very strict in requiring that parties intending to except to the Master's report should file their exceptions, and serve the order for setting them down, before the report is made absolute,² and will even order exceptions filed afterwards to be taken off the file,³ there are cases in which, under particular circumstances, it will relax from its rule, and permit exceptions to be filed after the report has been absolutely confirmed.⁴

The cases, however, where this has been done, are very rare, and the granting or not granting liberty to except after the report has been confirmed, is entirely discretionary in the Court.⁵

It may be mentioned here, that, in *Hawkins v. Day*,⁶ an application was made to Lord Hardwicke, for liberty to the party to take exceptions to the Master's report notwithstanding another set of exceptions had been taken and disposed of upon argument, and the report confirmed. It appeared that there had been great neglect of the interest of the petitioners, who were the representatives of an accounting party and resided at Bristol, and employed a solicitor at Bristol, who again employed an agent in London to

¹ Ante, pp. 1312, 1313.

² *Plunkett v. Lewis*, 12 Sim. 279.

³ *Sterling v. Thompson*, Coop. 271.

⁴ See *Allen v. Allen*, 1 Dick. 362; 1 Swanst. 157, n. S. C.; *Hawkins v. Day*, 1 Ves. 189; 1 Swanst. 158, S. C.; and *Belt's Supp. to Ves.* 106, S. C.; see also, *Montara v. Hall*, L. J. vol. 4, N. S. 53.

⁵ See *Earl of Bath v. Earl of Bradford*, 2 Ves. 587. See *Smith v. Smith*, 4 John Ch. 445; *Slee v. Bloom*, 7 John Ch. 137. The Court has power to open the report of a Master after confirmation, to correct any manifest error therein; *Cochran v. Lynch*, 1 Bailey Ch. 514; although no objection was taken to it. *Leveret v. Redwood*, 9 Porter (Ala.) 79; *Hooks v. Sellers*, 1 Dev. Ch. 61. A report which is objectionable on its face, may be objected to at the hearing, although no objection had previously been taken. *White v. Johnson*, 2 Munf. 235.

⁶ 1 Ves. 189; see the report of the same case in 1 Swanst. 158, n.

defend their cause, and that it was not until after the first exceptions had been heard and disposed of, that the applicants got a sight of the Master's report, and of such schedules thereto as related to the claim against them, and then found, to their very great surprise, many plain mistakes therein to their prejudice, which were not discovered or excepted to; under these circumstances, the Lord Chancellor was of opinion that it was reasonable that the petitioners should, upon certain conditions, which he prescribed, have liberty to re-argue the exceptions formerly taken to the Master's report, and to take new exceptions relating to the matters complained of in their petition, to come on to be argued at the same time. The result of this decision, however, was that, upon the counsel for the plaintiffs desiring, for the sake of despatch, to avoid such circuitry and the delay and expense which would be occasioned thereby, his Lordship ordered that, upon the applicants giving their own recognizance, within a fortnight from that time, in the penalty of 2,000*l.*, with a condition to pay such sum of money, if any, as should be found due from them, upon the balance of the account directed by the decree, to such parties to whom the same should be found due, together with interest for the same from that day, and paying to the plaintiffs such costs as they had been put to by taking out the Master's last report, so far as the same related to the account of the personal estate, and the administration thereof, and the costs subsequent thereto, so far as related, &c., and the costs of that application to the Court, and within a week after the taxation or settling thereof; that the confirmation of the said report should be so far opened as related to the account of the said personal estate and administration thereof, and that it should be referred back to the Master to review that part of the said report.¹

The form of exceptions to a Master's report is in all cases nearly the same; the nature of them, in cases of insufficiency or impertinence, has been already pointed out, and the same rules are generally applicable to all exceptions to reports. It has been held that where one general exception is taken to a report including several distinct matters, and the report appears right in any one instance, the exception will be overruled.² But in *Hoare v. John-*

¹ See *Belt's Sup.* to Ves. 106, S. C.

² *Hodges v. Salomons*, 1 Cox, 249; and see *Pearson v. Knapp*, 1 M. & K. 312;

stone,¹ Lord Cottenham laid it down as clear, that an exception may be allowed in part, unless it was so specially framed as to prevent it.²

It seems that formerly, the method of taking exceptions to the Master's report, upon a reference as to title, was generally "for that the Master had certified that the plaintiff could make a good title, whereas he ought to have certified that he could not make a good title," but that the present course is, to state the ground of objection to the title, in the exceptions. Such course, however, has only been adopted for convenience, so that if there is any substantial objection to the title which is not stated in the exception, the party is not precluded from arguing it.³ Where, however, an exception to a report not only states that the Master ought not to have reported as he has done, but suggests what he ought to have found, the Court, in allowing the exception, and referring it back to the Master, does not adopt the conclusion suggested in the exception, but leaves the whole subject of the reference to be considered by the Master, either upon the old evidence, or upon further evidence which may be brought before him.⁴

When the exceptions are taken, after objections have been carried in to the draft report and disallowed, the exceptions should be in conformity with the objections, and, though different in

Franklin v. Keeler, 4 Paige, 382; *Noble v. Wilson*, 1 Paige, 164; *Chandler v. Pettit*, 1 Paige, 427; *O'Reilly v. Brady*, 28 Ala. 530; *Brantley v. Gunn*, 29 Ala. 389; *Ashmead v. Colby*, 26 Conn. 287. The Court will not notice any exceptions to a Master's report, except those that point to the particular item or matter objected to. *Foster v. Gressett*, 29 Ala. 393; *Royall v. McKenzie*, 25 Ala. 363. So, where there is a general objection to the admission of evidence, a part of which is, and a part of which is not, admissible, but the inadmissible part is not pointed out, the report is not objectionable which shows that the whole was admitted. *Ashmead v. Colby*, 26 Conn. 287, 308, 309.

¹ 4 M. & C. 127.

² *Brantley v. Gunn*, 29 Ala. 387. In exceptions to a Master's report, a general assignment of errors is insufficient, unless specific errors are shown. *Dexter v. Arnold*, 2 Sumner, 108. Where a party excepts to an account which contains a number of items of charges, he must specify the specific charges of which he complains. He cannot, by a general exception, impose the burden upon the Court of examining every item in the account to detect the error. *Halcomb v. Halcomb*, 3 Stockt. (N. J.) 281.

³ *Abell v. Heathcote*, 4 Bro. C. C. 278 - 283.

⁴ *Livesey v. Livesey*, 10 Sim. 331; and see *Twyford v. Traill*, 3 M. & C. 645.

form, they must be substantially the same.¹ The practice, generally, is to prepare the objections in the form of the intended exceptions, and to convert them afterwards into exceptions.²

Exceptions are usually prepared and must be signed by counsel.

It is to be recollected, that in order to render exceptions available to suspend the confirmation of the report,³ or any proceeding upon a certificate,⁴ the order for setting them down should be entered and served.

By the 6th Order of the 5th May, 1837, every exception or set of exceptions taken to any report, made by a Master, in pursuance of a decree or order of reference, (not being an order obtained as of course,) made by the Lord Chancellor or a Vice-Chancellor, must be set down to be heard before the Lord Chancellor,⁵ and shall not without special order of the Lord Chancellor, be set

¹ *Ballard v. White*, 2 Hare, 158. Exceptions are always to be confined to objections allowed or overruled by the Master. *Copeland v. Crane*, 9 Pick. 73, 78; *Byington v. Wood*, 1 Paige, 45; *Lewis v. Lewis*, 1 Ala. 35; *Gordon v. Lewis*, 2 Sumner, 143; *Beckwith v. Butler*, 1 Wash. (Va.) 224; *White v. Johnson*, 2 Munf. 235. In a hearing upon exceptions to a Master's report, nothing is properly before the Court except the matter of those exceptions. Whatever may have been insisted upon before the Master, is considered as waived or abandoned, if it is not made matter of exception, unless it appears on the face of the report that the Master has committed an error. *Gordon v. Lewis*, *supra*. See *Methodist Epis. Church v. Jaques*, 3 John. Ch. 81; *Lewis v. Lewis*, 1 Ala. 35. And "exceptions are to be regarded so far only as they are supported by the special statements of the Master, or by evidence, which ought to be brought before the Court by reference to the particular testimony on which the party taking the exceptions relies." *Rice J.*, in *Miller v. Whittier*, 36 Maine, 585; *Harding v. Hanley*, 11 Wheat. 103.

² Exceptions are in the nature of special demurrers, and the party objecting must point out the error; otherwise the part not excepted to will be taken as admitted. *Wilkes v. Rogers*, 6 John. 566; *Story v. Livingston*, 13 Peters (U. S.) 359; *O'Reilly v. Brady*, 23 Ala. 530. Where several exceptions to an answer are allowed by the Master, and the defendant takes one general exception to the report, that exception will be overruled, if any of the exceptions to the answer are well taken. *Candler v. Pettit*, 1 Paige, 427; *Franklin v. Keeler*, 4 Paige, 382; *Noble v. Wilson*, 1 Paige, 164; *Higbee v. Brown*, 1 Barb. Ch. 320.

³ *Ibid.* 1310.

⁴ *Ibid.* 1314.

⁵ The particular Vice-Chancellor before whom they are to be heard, is determined by the 5th Order of November, 1841.

down to be heard before the Master of the Rolls; and, by the 10th of the same Orders, it is directed, that every exception, &c., taken to any report, made pursuant to a decree or order of reference, (not being an order obtained as of course,) made by the Master of the Rolls, must be set down to be heard before the Master of the Rolls, and shall not otherwise than for the purpose of rehearing, be set down to be heard before the Lord Chancellor.

A plaintiff may set down exceptions to the report at the same time that he sets down the cause to be heard upon further directions.¹

When exceptions to a report have been set down, they are argued and disposed of in the manner already described; ² it may be mentioned, however, that the counsel of all parties interested in the report, are allowed to be heard in support of the report, and against the allowance of the exceptions; but only the exceptant's counsel can be heard in support of the exceptions.³ It may also be mentioned, that, upon hearing exceptions to a Master's report, you cannot read affidavits made subsequent to it,⁴ or any evidence which was not before the Master when he made the report.⁵ In *Ridifer v. O'Brien*,⁶ where it was admitted, on the

¹ *Yeo v. Frere*, 5 Ves. 424.

² Upon the hearing of exceptions to the report, the party excepting must confine himself to the exceptions, and will not be allowed to go into a new case. The Court acting merely in revision of the report, cannot entertain an objection raised on an extrinsic ground. *Kilbee v. Sneyd*, 2 Moll. 239.

³ 2 Smith, 376.

⁴ *Davis v. Davis*, 2 Atk. 21.

⁵ See *White v. The Okisco Co.* 3 Maryland Ch. Dec. 214. Exceptions to the Master's report must be founded on the facts stated in the report, or in the accompanying documents and proofs. *Dexter v. Arnold*, 2 Sumner, 108; *Harding v. Handy*, 11 Wheat. 103; *Rennell v. Kimball*, 5 Allen, 356.

Upon exceptions to the report of a Master, in which the evidence is not reported in detail, the Court will not revise his conclusions in matters of fact, nor recommit his report for the purpose of having the evidence reported upon which such conclusions were based, if no request to that effect was made before the Master. *Sparhawk v. Wills*, 5 Gray, 423. See *Ashmead v. Colby*, 26 Conn. 287; *Holabird v. Burr*, 17 Conn. 563.

If the evidence is reported by the Master, it is competent for the Court to find the facts and make a decree thereon. *McHenry v. Moore*, 5 Califor. 90; *Taylor*

⁶ 3 Mad. 44.

argument of the exceptions, that there was no sufficient evidence before the Master to warrant a different finding by the Master, but it was contended, that additional evidence, which had been since procured, was admissible to show that the report was incorrect; Sir J. Leach, V. C., would not permit any argument upon the evidence which was not before the Master, and, on overruling the exception, refused to direct the Master to receive the additional evidence, but allowed the matter to go back to the Master, with an intimation, that, if he refused to receive the additional evidence, the exceptant might make a distinct motion that he should be ordered to receive it.

It may be stated here, that, when it appears upon the hearing of the exceptions, that the excepting party did not lay a material piece of evidence before the Master, which he had then in his power, and that the error in the Master's report was owing to such omission, the Court will not direct the Master to review his report upon any other terms than the exceptant's giving up his deposit.¹

The rule which precludes the reading of any evidence which was not before the Master, also precludes the reading of any parts of a defendant's answer, which were not read in the Master's office.²

It may be mentioned, that if a Master improperly rejects evidence which has been tendered to him, it should form a specific subject of exception to his report.³

v. Read, 4 Paige, 561. See *Knapp v. White*, 23 Conn. 529; *Jackson v. Jackson*, 2 Green Ch. 96.

Where numerous exceptions were taken to a Master's report, and the party excepting applied for an order on the Master to furnish *certified copies of the minutes and testimony* taken in the case before a former Master, since deceased, and before himself, as the same were in his possession, and of *all notes and memorandums* made upon the testimony by the Master, and all the vouchers produced in evidence before him, relative to the matters of charge and discharge in taking the account, the Court, on account of the difficulty of specifying the particular parts of the testimony wanted, granted the motion, with the condition, which was considered essential and sufficient to prevent abuse, that the expense of returning such parts of the testimony as should not be found necessary to support the exceptions, should, in any event, be paid by the party at whose request they were returned. *Jaques v. Methodist Epis. Church*, 2 John. Ch. 543.

¹ *Hedges v. Cardonnell*, 2 Atk. 408.

² *Rands v. Pushman*, 6 Sim. 46.

³ But see *Ward v. Jewett*, Walk. Ch. 45, where it was held, that an improper

It is to be observed, that it is not competent to the Court upon exceptions, to make an order which is not quite consistent with the original decree ; from the time of the pronouncement of the decree, all the subsequent proceedings should be consistent with it, and if, upon argument of exceptions, it appears, that the justice of the case cannot be got at without an alteration of the decree, it must be reheard.¹

If, upon argument, or upon default of the plaintiff,² the exceptions are overruled, the overruling of them has all the effect of confirming the report absolutely, and if the cause has been set down to be heard upon further directions, to come on at the same time with the hearing of the exceptions, the Court proceeds at once to hear the cause upon further directions.³ So also, if the exceptions, or any of them, are allowed, but it is not necessary to refer the report back to the Master to be reviewed, the hearing of the cause upon further directions may be proceeded with, in the same manner as if the exceptions had been overruled.⁴

If the allowance of the exceptions, or any of them, renders it necessary to refer it back to the Master, an order is made referring it back to the Master to review his report, and the reservation of further directions and of the costs of the suit is continued until after the Master shall have made his report.⁵

The same rules which have already been laid down with regard to the deposit on and the costs of exceptions to Masters' reports upon the insufficiency of answers, apply to the deposit on and costs of exceptions to the reports of Masters in general ;⁶ and it may be mentioned, that where there are several parties appearing by rejection of testimony is to be corrected by a motion to the Court for an order compelling the Master to receive the evidence, and not by excepting to his report.

¹ Per Lord Eldon, in *Brown v. De Tastet*, Jac. 293 ; see, also, *E. I. Company v. Keighley*, 4 Mad. 16.

² *Rookes v. Rookes*, 7 Jur. 1104.

³ 2 Smith, 400, 3d ed.

⁴ *Ibid.*

⁵ *Ibid.* ; and see *Daubeney v. Coghlan*, 12 Sim. 507. Upon the allowance of an exception to the Master's report, as to the amount of damages sustained, the Court can modify the report and settle the amount, without referring it back to the Master. *Taylor v. Reed*, 4 Paige, 561.

⁶ As to the costs of persons excepting, who seek to establish claims, but are not parties to the suit, see ante, pp. 1209, 1210. *Stafford v. Rogers*, 1 Hopkings, 98.

different solicitors, and each takes exceptions to the report, and the exceptions are allowed, the costs of all the excepting parties will in general be given to them, although the exceptions are in each case the same.¹ It should be recollected, that if the costs of exceptions to a report are not ordered to be costs in the cause, they cannot be allowed as such.²

It may be mentioned, in this place, that sometimes, upon the argument of exceptions, the Court will think it right, before it comes to a decision upon the subject-matter of the exception, to send it back to the Master to supply some defect in his report,³ or to make inquiry into some facts which may be necessary to enable the Court to come to a proper conclusion; in such cases, the Court usually adjourns the consideration of the exceptions, or of the particular exception in question, till after the Master shall have made the supplemental report. So, also, when the subject-matter of the exception is a fact depending upon conflicting evidence, the Court will frequently, before it decides upon the exception, direct an issue at law to try the disputed fact, reserving the decision upon the exception till after the trial.⁴ In all such cases, the course of the Court is to postpone the consideration of the disposal of the deposit paid, upon filing the exceptions, and of the costs till the ultimate decision upon the exception.

Review of Report.

Although the usual course by which a review of the Master's report is to be procured, is by taking exceptions to it, there are many cases in which the Court will direct the Master to review his report without requiring exceptions to be taken;⁵ or, if they are taken, will direct it to be reviewed upon grounds independent

¹ *Trezevant v. Fraser*, MSS. 12th Jan. 1836.

² 2 Smith, 383; and see *Wilkins v. Stevens*, 1 Y. & C. 436. In the United States Courts, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party, whose exceptions are overruled, shall, for every exception overruled, pay costs to the other party, and for every exception allowed, shall be entitled to costs, — the costs to be fixed in each case by the Court, by a standing rule of the Circuit Court. Equity Rule, 84.

³ See *Ex parte Charter*, 2 Cox, 168.

⁴ *Wilson v. Metcalfe*, 3 Mad. 45; see, also, *Gregg v. Taylor*, 4 Russ. 279.

⁵ *Gibson v. Broadfoot*, 3 Desaus. 586; *Quintz v. Quintz*, 2 Hayw. 182; *Dutch Church at Freehold v. Smock*, 1 Saxton (N. J.) 148; *Honore v. Colmeshil*, 1 J. Marsh. 510; *White v. Johnson*, 2 Munf. 285.

of those laid by the exceptions; and sometimes, as we have seen, the Court will direct a Master to review his report, in order to afford a party an opportunity for taking in objections to the draft, as a foundation for exceptions.¹

A reference back to the Master, to review a report which has not been excepted to, may be made upon the hearing for further directions; and is frequently so made when the Court is not satisfied with the Master's finding, as where the Master has not found sufficient facts for the Court to found its judgment upon.² So, also, if the Master has exceeded his authority, it will either direct him to review his report or take no notice of his finding.

We have seen before, that where the report is the consequence of an order pronounced upon petition, or is upon the taxation of costs, the Court will, if the objections to the report are not apparent upon the face of it, entertain a petition to refer it to the Master to review his report.³

In some cases, also, the Court will direct a review of the Master's report, upon application by motion; thus, where there has been some omission or error in the report, which would prevent the matter being properly raised by exceptions, the Court has, upon motion, ordered the Master to review his report, as where, upon a reference of an examination for impertinence, the Master certified, generally, that the examination was impertinent, the Vice-Chancellor, on motion, referred it back to the Master to review his certificate, and state in what respects he considered the same impertinent.⁴

And, even where exceptions to the report have been heard and disposed of, the Court has, at the instance of a vendor, directed the Master to review his report, in order to give him an opportu-

¹ *Valence v. Weldon*, 1 Dick. 299. Where the order for confirming the Master's report is regular, the order will not afterwards be vacated, so as to allow the defendant to except to the report, when he purposely kept back his objections at the time, and did not state them before the Master, though he had full knowledge of all the facts which formed the grounds of his exception. *Slee v. Bloom*, 7 John. Ch. 137. See *Pickett v. Hewlings*, Halst. Dig. 174. Should the Master, however, make his report without giving the parties an opportunity to object to it, if they see proper, the Court would, immediately on an application for the purpose, order the report back to the Master to hear the objections. *Pickett v. Hewlings*, Halst. Dig. 174.

² *Turner v. Turner*, 1 Dick. 313; 1 Swanst. 156, n. S. C.

³ Ante, p. 1312.

⁴ Anon. 3 Mad. 246.

nity of completing his title.¹ The Court has, also, as we have seen,² referred a report, as to title, back to the Master to be reviewed, upon application, by motion, even after the report has been confirmed.³

In general, however, the Court is very cautious in admitting applications to review a Master's report after it has been confirmed; and it is only in cases of fraud, surprise, or mistake, that it will be permitted;⁴ and, even then, it will not be allowed unless a very strong case is made.⁵ And, it seems, that it is not competent to the Lord Chancellor to order the Master to review a report confirmed and followed by a decree of the Master of the Rolls, containing consequential directions, whilst that decree stands.⁶ The proper course, in such case, would be to have the cause reheard; but, even then, the Court will not permit the report to be even discussed, unless a very strong case is made out to induce the Court to allow it.⁷

Amendment of Report.

It is to be noticed, that the proper course for correcting errors or supplying deficiencies in a report which has been confirmed, is by bill of review, yet errors, apparent in the schedules, have been corrected, even after enrolment, on a summary application;⁸ thus

¹ As to the cases in which the Court will send it back to the Master to review his report as to a title, see ante, p. 1215.

² Ibid.

³ The commissioner's report on matters of account may be opened after confirmation, where the fund is still in the power of the Court, for the purpose of correcting an error originating in mistake or fraud. *Cockran v. Lynch*, 1 Bailey, Eq. 514.

⁴ *Drought v. Redford*, 1 Moll. 573.

⁵ *Turner v. Turner*, 1 Jac. & W. 39. Where a matter of fact, depending on conflicting testimony, and the credibility of witnesses, has been referred to a Master, his decision will not be interfered with, on his mere judgment of facts, unless it is a very plain case of error or mistake. *Izard v. Bodine*, 1 Stockt. (N. J.) 309; *Sinnickson v. Bruere*, 1 Stockt. (N. J.) 659. Or unless there be some abuse of authority on the part of the Master; and the burden is on the excepting party to establish the mistake or misconduct alleged. *Howe v. Russell*, 36 Maine, 115, 127; *Da Costa v. Da Costa*, 3 P. Wms. 140, note; *McDougald v. Dougherty*, 11 Georgia, 570.

⁶ *Turner v. Turner*, 1 Swanst. 154.

⁷ *Turner v. Turner*, 1 Jac. & W. 42.

⁸ *Weston v. Haggerston*, Coop. 134.

where, in taking an account in the Master's office, a mistake was made in the casting up of the schedules, and, upon the cause coming on upon further directions, the defendant was decreed to pay a sum, appearing by the schedules so cast up, to be due from him, and the plaintiff enrolled the decree, after which the mistake was discovered, Lord Eldon, upon an application to correct the error, said, that all errors apparent on the face of the schedules might be corrected, even after enrolment, but that there could be no correction except of such apparent errors. His Lordship accordingly permitted the mistakes in the schedules, which were apparent, to be corrected, but refused a subsequent application, by the plaintiff, in the same case, to have some further sums, which he claimed, inserted in the schedules.¹

CHAPTER XXVII.

PROCEEDINGS IN THE JUDGES' CHAMBERS.

UNTIL a very recent period in the history of the Court of Chancery, it was the practice in every suit of any degree of complication to refer to one of the Masters of the Court either inquiries to be investigated, or directions to be carried into effect. The form of these references, and the circumstances under which they were made, constituted a most material part of the general practice of the Court. The Masters exercised an almost independent jurisdiction in carrying out these references. No communications took place between the Master prosecuting a reference and the Judge who directed it, but the Master completed the duty delegated to him, and then drew up a lengthy report, stating the result of his inquiries and what he had done in obedience to the decree. After this report was made the cause came again before the Court for a final settlement, and a decree was made, based upon the decisions and investigations of the Master. The parties, by excepting to the report, might appeal to the Court against the decision of the Master, and reopen all the questions that had been decided.

¹ See *White v. Johnson*, 2 Munf. 284; *Hatchett v. Cremorne*, Sausse & S. 675; *Miller v. Rushforth*, 3 Green Ch. 174; *Howe v. Russell*, 36 Maine, 115, 127; 2 Madd. Ch. Pr. 507; *Mason v. Crosby*, 3 Wood & M. 258.

The office of Master was abolished by the 15 & 16 Vict. c. 80, subject, however, to the final termination of some matters then before the existing Masters, and subject also to cases under the Winding-up Act, as to which the 10th section provides that, "From and after the first day of Michaelmas Term, 1852, no reference shall be made to any of the Masters in ordinary of the said Court, except in cases in which, from some previous reference made in the cause or matter, or in some other cause or matter connected therewith, the Court may think it expedient to make such reference, and except in matters arising under the Joint-Stock Companies Winding-up Acts, 1848-1849."¹ As the matters now before the Master are nearly worked out, and as it is not probable that any more references will be made to them, it will not be necessary to enter further into the practice of the Master's offices. The preamble of the Act of Parliament abolishing the office of Master, in the following short vigorous language, states the desire of the Commissioners, and of almost every one else who recollects the former practice of the Court and of the Masters' offices: "Whereas proceedings before the Masters in ordinary of the High Court of Chancery are attended with much delay and expense, and it is expedient that the business now disposed of in the offices of such Masters should be transacted by and under the more immediate direction and control of the Judges of the said Court."

It is intended in this Chapter to explain in what manner the object of the Act has been carried into effect, and by what means the business formerly conducted in the Masters' offices is now transacted, under the more immediate direction and control of the Judges of the said Court.

In the first place the Act provides, that the Judges themselves should preside over and take part in the duties performed at chambers. For by the 11th section it is provided, that "It shall be lawful for the Master of the Rolls, and the Vice-Chancellors, for the time being, and they are hereby required, to sit at chambers for the despatch of such part of the business of the Court as can, without detriment to the public advantage, arising from the discussion of questions in open Court, be heard in chambers, according to the directions hereinafter in that behalf specified or referred to."

¹ The Judge has, however, a discretion to refer cases under the Winding-up Acts to himself in chambers. See 17 Beav. 470.

In former times the jurisdiction of the Master was limited strictly by the terms of the reference to him. He could prosecute no other inquiries than those contained in the decree, nor deviate in any manner from the strict terms of the reference. But now, by the 13th section, "The Master of the Rolls, and every one of the Vice-Chancellors respectively, when sitting at chambers, shall have the same power and jurisdiction in respect of the business to be brought before them, as if they were respectively sitting in open Court."¹ A Judge will not therefore be compelled to prosecute any inquiry against the wishes of the parties, and which may turn out to be unnecessary. Moreover, there is no want of jurisdiction to prevent a Judge at chambers varying the terms of the inquiry, though such a step is not usual.²

By the 40th section, the Judge in chambers has power to act upon the opinion of conveyancing counsel in certain matters which were formerly referred to such counsel by the Master;³ and, by the 36th section of the Act, he has all the "powers, authorities and jurisdiction" which the Masters formerly possessed under any Act of Parliament; and by the 58th Order of 16th October, 1852, the Judges in chambers may exercise all the jurisdiction which the Masters possessed under any order of the Court; and, by the 59th of the same Orders, "The power of the Court, and of the Judge sitting in chambers, to enlarge or abridge the time for doing any act, or taking any proceeding, and to give any special direction as to the course of proceeding in any cause or matter, is unaffected by the Orders." This Order prevents any doubt as to the jurisdiction of a single Judge in chambers to vary the times fixed by General Orders.

The orders of the Judges at chambers have the same force and effect as orders of the Court of Chancery, and may be signed and enrolled in like manner. They are usually drawn up by the clerks of the Judges, but a power is given, enabling the Judges to direct that particular orders be drawn up by the Registrars of the Court in the same manner as orders made in open Court are

¹ Any Judge of the Court, whose chambers may be open for business during the vacation, may issue summonses for the purpose of any proceedings before the Master of the Rolls or any Vice-Chancellor after the vacation. 2d Order of June, 1854.

² *Saunders v. Walter*, 9 Hare, Appx. v.

³ For the manner in which these counsel are appointed, see post, the chapter on Sales of Estates.

drawn up.¹ And by the 28th Order of the 16th October, 1852, they are to be entered in the same manner, and in the same office, as orders made in open Court.

By the Act for abolishing the office of Master, each of the Judges appoints two chief clerks, and one junior clerk to each chief clerk, who are under the control of the Judge who nominates them. The chief clerks hold their office during good behavior, subject to removal by the Lord Chancellor under the 25th section; but the junior clerks hold their office at the pleasure of the Judge to whose Court they are attached.²

Moreover, since the passing of the Act for abolishing the office of Master, by the 18 & 19 Vict. c. 134, it is enacted, that "It shall be lawful for the Master of the Rolls, and each of the Vice-Chancellors, to appoint forthwith after the passing of this Act one additional junior clerk to each of their respective chief clerks, and for the Master of the Rolls and the Vice-Chancellors, for the time being, respectively to fill up from time to time such vacancies as may occur in the respective offices of the junior clerks so appointed."

With respect to the powers of the chief clerks, it will be convenient to set forth the precise language of the statutes on the subject. By the 29th, 30th and 31st sections of the Act for abolishing the office of Master,³ it is enacted, that —

"The Master of the Rolls and the Vice-Chancellors respectively shall have the sole power (subject to any rules which may be made by the Lord Chancellor with the advice and assistance of them or any two of them) to order what matters and things shall be investigated by and before their respective chief clerks, either with or without their direction, during their progress, and what matters and things shall be heard and investigated by themselves; and particularly, if the Judge shall so direct, his chief clerks respectively shall take accounts, and make such inquiries as have usually been prosecuted before the chief clerks of the present Masters; and the Judge shall give such aid and directions in every or any such account or inquiry as he may think proper, but subject nev-

¹ See Sects. XIV. and XV., and ante, p. 1024, as to the manner of drawing up orders made in open Court; and see observations of the Vice-Chancellor Wood, in *Hayward v. Hayward*, 1 Kay, App. xxxi.

² 15 & 16 Vict. c. 80, § 16 to 25.

³ 15 & 16 Vict. c. 80.

ertheless to the right hereinafter provided for the suitor to bring any particular point before the Judge himself.”¹

“Each chief clerk shall, for the purpose of any proceedings directed by the Master of the Rolls or any Vice-Chancellor to be taken before him, have full power to issue advertisements, to summon parties and witnesses, to administer oaths, to take affidavits and acknowledgments, other than acknowledgments by married women, to receive affirmations, and, when so directed by the Judge to whose Court he is attached, to examine parties and witnesses either upon interrogatories or *vivâ voce*, as such Judge shall direct.”

“Parties and witnesses so summoned shall be bound to attend in pursuance of any such summons, and shall be liable to process of contempt, in like manner as parties or witnesses are now liable thereto in case of disobedience to any order of the said Court, or in case of default in attendance, in pursuance of any order of the said Court, or of any writ of *subpœna ad testificandum*; and all persons swearing or affirming before any such chief clerk shall be liable to all such penalties, punishments, and consequences for any wilful and corrupt false swearing or affirming contained therein as if the matters sworn or affirmed had been sworn and affirmed before any person now by law authorized to administer oaths, to take affidavits, and to receive affirmations.”

With respect to the particular description of business that is usually transacted at chambers, it will be convenient first to set out the statutory provisions on the subject.

By the 26th section of the 15 & 16 Vict. c. 80, it is enacted, that the business to be disposed of by the Master of the Rolls and the Vice-Chancellors respectively, while sitting in chambers, shall consist of such of the following matters as the Judge shall from time to time think may be more conveniently disposed of in chambers than in open Court, *videlicet* :—

Applications for time to plead, answer or demur ;
for leave to amend bills or claims ;
for enlarging publication ;

And also applications for the production of documents ; applications relating to the conduct of suits and matters ; applications as to the guardianship and maintenance of infants.

Matters connected with the management of property and such

¹ See *Saunders v. Walter*, 16 Jur. 1008 ; 9 Hare, App. 5.

other matters as each such Judge may from time to time see fit, or as may from time to time be directed by any General Order of the Lord Chancellor.

In all the cases enumerated above, the parties to the cause may at once apply to the Judge at chambers, without any previous order of the Court.

In addition to applications of the above description there is a very large amount of business arising out of direct references by the Judges in open Court. For by the 27th section of 15 & 16 Vict. c. 80, "It shall be lawful for the Master of the Rolls, and every of the Vice-Chancellors respectively, when sitting in open Court, to adjourn for consideration in chambers any matters which, in the opinion of such Judge, may be more conveniently disposed of in chambers; or when sitting in chambers, to direct any matter to be heard in open Court which he may think ought to be so heard."

It was doubtful, until recently, whether there was any jurisdiction to order that proceedings on petitions to be presented in a summary manner under Acts of Parliament might be at once commenced in chambers. But now, by the 18 & 19 Vict. c. 134, s. 16, it is enacted as follows:—

"And whereas, by divers Acts of Parliament, the Court of Chancery is empowered to make orders in respect of the disposition of trust funds and other matters under its jurisdiction upon petition presented, or motion made in a summary way without bill; but such orders cannot be made in respect of the same matters at chambers: be it therefore enacted, That the business to be disposed of by the Master of the Rolls and the Vice-Chancellors respectively, while sitting at chambers, shall comprise such of the matters in respect of which the Court of Chancery is so as aforesaid empowered to make orders in a summary way as the Lord Chancellor, with the advice and assistance of the Master of the Rolls and the Vice-Chancellors, or any two of them, may by any General Order direct."

This portion of the jurisdiction remains at present incomplete, as no General Order under the Act appears to have issued.

These statutes and orders seem to define with sufficient accuracy what matters and things may originate in chambers. It may be convenient, however, also to set forth a notice affixed at the Judges' chambers on the 10th of November, 1852.

The following applications may be made at chambers : —

1. As to guardianship of infants, except the appointment of guardian *ad litem*.
2. For the appointment of special guardian to concur in a special case.
3. As to maintenance or advancement of infants.
4. Under the Drainage Acts.
5. Under the Trustee Acts of 1850 and 1852.
6. For the administration of estates under the Act of 15 and 16 Vict. c. 86.
7. Under the Legacy Duty Act for the payment of money out of Court.
8. For time to plead, answer or demur.
9. For leave to amend bills or claims.
10. For enlarging publication.
11. For the production of documents.
12. Relating to the conduct of suits.
13. As to matters connected with the management of property.
14. As to matters connected with the payment into Court of purchasers' moneys under sales by order of the Court, and investing the same.

It appears, also, that applications under 15 & 16 Vict. c. 86, s. 57, for allowances out of income *pendente lite* may be made in chambers.¹

Under the Act for the abolition of the office of Master the jurisdiction of the Judge at chambers is the same as in open Court, and to prevent all doubt we have seen, that, by 18 & 19 Vict. c. 134, this power is extended to orders to be made under Acts of Parliament,² so that there can be no doubt of the validity of orders made on all the subjects above mentioned in chambers.

We have seen, that in cases requiring the exercise of much discretion on the part of the Judge, the application may be adjourned from chambers and heard in open Court.³

It will be convenient in the next place to consider in what manner proceedings are conducted in chambers ; and on this subject it may be remarked, that some proceedings originate in chambers, and others commencing in open Court are subsequently

¹ Knight v. Knight, 16 Beav. 359.

² Subject, however, to a General Order issuing upon the subject.

³ 15 & 16 Vict. c. 80, s. 27 ; and see Morgan v. Hatchell, 19 Beav. 86.

referred to chambers. It will be found, that there are some orders applicable exclusively to proceedings originating in chambers, but in general the practice is the same.

By sect. 28 of 15 & 16 Vict. c. 80, "The mode of proceeding before the Master of the Rolls and Vice-Chancellors respectively shall be by summons, and as near as may be according to the form now adopted by the Judges of the Superior Courts of Common Law when sitting at chambers."

By the 1st Order of 16th October, 1852, the following form of summons may be adopted for the purpose of proceedings, "whether originating in chambers or not, with such variations as the circumstances of the case may require:" —

In Chancery.

In the matter of John Thomas, an infant, *or*

Joseph Wilson

against

William Jackson.

Let all parties concerned attend at my chambers in the Rolls Yard, Chancery Lane, Middlesex, (*or* at No. —, Lincoln's Inn, Middlesex,) on the — day of —, at — o'clock in the — noon, on the hearing of an application on the part of [*here state on whose behalf the application is made, and the precise object of the application.*]

Dated this — day of —.

John Romilly, Master of the Rolls, [*or*
Richard T. Kindersley, Vice-Chancellor.]

This summons was taken out by A. and B., of Lincoln's Inn, in the county of Middlesex, solicitors for —.

To —.

The following note is to be added to the original summons when proceedings originate in chambers; and when the time is altered by indorsement, the indorsement to be referred to as below: —

NOTE. — If you do not attend, either in person or by your solicitor, at the time and place above mentioned [*or* at the place above mentioned, at the time mentioned in the indorsement thereon] such order will be made and proceedings taken as the Judge may think just and expedient.

It will be recollected, that, under the 30th section,¹ the chief

¹ Ante, p. 1332.

clerk has power to issue summonses for parties or witnesses to attend and be examined before him.

The following is the form of summons given by the Orders of October, 1852, for this purpose:—

In Chancery.

In the matter of the estate of John Thomas, late of —, in the county of —, deceased, *or*

Joseph Wilson,
against

William Jackson.

The defendant William Jackson [*or* A. B., of &c.] is hereby summoned to attend at the chambers of the Master of the Rolls [*or* Vice-Chancellor —], in the Rolls Yard, Chancery Lane, [No. —, — Square, Lincoln's Inn, Middlesex,] on the — day of —, at — of the clock in the — noon, to be examined [*or* to be examined as a witness] on the part of the —, for the purpose of the proceedings directed by the Master of the Rolls [*or* the said Vice-Chancellor] to be taken before me.

Dated this — day of —, 1852.

A. B., Chief Clerk.

The summons was taken out by A. and B., of Lincoln's Inn, in the county of Middlesex, solicitors for —.

It will be recollected that, under the 45th sect. of 15 & 16 Vict. c. 86, a power is given to creditors' legatees and next of kin to proceed at once without bill filed for a summons upon the personal representative of the deceased person, in whose estate they are interested, and that, by the 47th section, a similar power is given in the case of real estate, which is by devise vested in trustees, who are authorized by the Act to sell the same, and to give receipts for the rents and profits, and for the produce of the sale.¹ A form of summons for a person proceeding in this form is given in the Orders of the 7th August, 1852.

In Chancery.

In the matter of the estate of John Thomas, late of the parish of H., in the county of M., deceased.

Joseph Wilson
against

William Jackson.

¹ See *Acaster v. Anderson*, 19 Beav. 161; *Ashley v. Sewell*, 3 Dé Gex, M. & G. 933, as to the circumstances under which such a summons will be granted.

Upon the application of Joseph Wilson, of Russell Square, in the county of Middlesex, Esq., who claims to be a creditor upon the estate of the above-named John Thomas, Esq., William Jackson, the executor of the said John Thomas, attend at my chambers, in the Rolls Yard, Chancery Lane, Middlesex, [*or* at No. —, — Square, Lincoln's Inn, Middlesex,] on the — day of —, at — of the clock in the afternoon, and show cause, if he can, why an order for the administration of the personal estate of the said John Thomas by the High Court of Chancery should not be granted.

Dated this — day of —, 1852.

John Romilly, Master of the Rolls, [*or*
Richard T. Kindersley, Vice-Chancellor.]

NOTE. — If the above-named William Jackson does not attend either in person or by his solicitor at the time and place above mentioned, such order will be made in his absence as the Judge may think just and expedient.

This summons was taken out by A. and B., of Lincoln's Inn, in the county of Middlesex, solicitors for the above-named Joseph Wilson.

One or other of the foregoing forms of summons, "or with such variations as the circumstances of the case may require"¹ will be found applicable to all cases in which such a document is required. The 3d Order of October, 1852, then provides, that "A seal is forthwith to be prepared for the chambers of the Master of the Rolls and each of the Vice-Chancellors, and summonses are to be prepared by the parties and sealed by one of the clerks at the chambers of the Judge from whose chambers they are issued, and a copy of such summons is to be left at the Judge's chambers by the party obtaining such summons."

Moreover, with respect to proceedings originating in chambers the 4th Order directs, that "In cases of application under 15 & 16 Vict. c. 86, s. 45, applications for guardianship and maintenance of infants originating in chambers (and of all other applications originating in chambers) a duplicate of the summons is to be filed in the Record and Writ Office, and in cases where service is required the copies served are to be stamped in the manner prescribed by sect. 46 of 15 & 16 Vict. c. 86."

¹ Order 1 of 16th October, 1852.

The 46th section here referred to is as follows : — “ A duplicate or copy of such summons shall, previously to the service thereof, be filed in the Record Office of the said Court ; and no service thereof upon any executors or administrators shall be of any validity unless the copy so served shall be stamped with a stamp of such office, indicating the filing thereof, and the filing of such summons shall have the same effect with respect to *lis pendens* as the filing of a bill or claim.”

By the 21st of the same Orders — “ At the time any summons or appointment is obtained an entry thereof is to be made in a book, called ‘ The Summons or Appointment Book,’ stating the date on which the summons is issued or appointment made, the name of the cause and matter, and by what party, and shortly for what purpose such summons or affidavit is obtained and at what time returnable.”

The foregoing regulations provide for everything connected with the preparation of the summons.

With respect to the service of the summons —

The 5th Order of 16th October, 1852, provides, that “ In cases where proceedings originate in chambers the original summons is to be served seven clear days before the return thereof. All other summonses not being summonses referred to in Order 2¹ are to be served two clear days before the return thereof.”

And by the 6th Order, “ In cases where proceedings originate in chambers, and where from any cause the summons may not have been served upon any party seven clear days before the return thereof, an indorsement may be made upon the summons, and upon a copy thereof stamped for service, appointing a new time for the parties not before served to attend at the chambers of the Judge, and such indorsements are to be sealed at the Judges’ chambers, and the service of the copy so indorsed and sealed is to have the same force and effect as the service of an original summons ; and where any party has been served before such indorsement the hearing thereof may, upon the return of the summons, be adjourned to the new time so appointed.”

No precise directions with respect to the service of a summons are given. Consequently, it may be well inferred, that, with respect to proceedings originating in chambers, when persons are

¹ The summons here referred to is that to be issued by the chief clerk for the examination of parties.

summoned not at the time before the Court, the same practice will apply as before stated concerning the service of a copy of a bill and other documents that require personal service.¹ When the person to be served is before the Court the summons will be served in the same manner as documents not requiring personal service.²

It will be observed, that "seven clear days" must intervene between the service and the return of the summons. The word "clear" takes this order out of the ordinary rule of computation. It would appear that the day of service and also the day of return must be excluded from the computation. In computing the "seven clear days," and the "four clear days," Sundays and the days when the offices are closed are included, unless the day of return falls upon them, in which case the return must necessarily be postponed to the following day.

With respect to the persons to be served in administration suits, the course of proceedings is this:—having ascertained who are the parties interested in the estate, upon the first summons before the Judge in chambers to proceed with the decree, the Judge will consider any circumstances which may be brought before him with reference to any of the parties, and direct who are the parties to be served, and whether service on any of them can be dispensed with.³

The summons having been duly served, an affidavit of service should be made and filed, and an office copy preserved. It is incumbent on the person served, if he is not already before the Court, to enter an appearance; for the 7th Order directs, that "In all cases when proceedings originate in chambers the parties served are, before they are heard in chambers, to enter appearances in the Record and Writ Office, and give notice thereof."

The appearance will be similar in form to the appearance to a bill. It will give an address for service, and notice will have to be given to the solicitor of the person serving the summons.

When the time comes for hearing the matter, concerning which the summons has issued, it will then be taken in its turn. By the 22d Order, lists of matters appointed for each day are to be made

¹ Ante, p. 428.

² Ibid., *et seq.*

³ *De Balinhard v. Bullock*, 9 Hare, App. xiii. And see Orders 18 & 19 of 16th October, 1852.

out and affixed outside the doors of the chambers of the respective Judges, and subject to any special direction, such matters are to be heard in the order in which they appear on such list.

With respect to the course of proceeding upon the hearing any matter in chambers, the following General Orders apply.¹ "The course of proceeding in chambers is ordinarily to be the same as the course of proceeding in Court upon motions. No state of facts, charges or discharges are to be brought in; but when directed, copies, abstracts or extracts, of or from accounts, deeds or other documents, and pedigrees and concise statements are to be supplied for the use of the Judge and his chief clerk, and where so directed copies are to be handed over to the other parties. But no copies are to be made of deeds or documents when the originals can be brought in without special direction."

The practice of the Court on motions, which is by this Order made to apply in general to proceedings in chambers, will be stated in a subsequent chapter; but it may be here stated, that the notice of motion contains the form of order sought to be obtained, and is all that the Court has before it to determine the issue between the parties. The whole case for or against the motion is submitted in the shape of affidavits. This practice is very convenient and inexpensive for the hearing of the particular application; but it is open to the objection, that, on reference back to the proceedings at any future time, the foundation for the order, or the grounds for the refusal of the order, and everything else explanatory of it, are to be sought for from the contents of a variety of documents. Moreover, neither the orders themselves, made by the Judge or his clerk, nor the evidence wherein they were based, will be found in the proceedings of the office. This must in many cases produce confusion and some repetition in affidavits, but probably the balance of convenience is in favor of the simplest form of practice.

By the 24th Order of 16th October, 1852, "The party intending to use any affidavit in any proceeding in chambers is to give notice to the other parties concerned of his intention in that behalf." The rules with respect to filing affidavits in proceedings before the Court have been before fully stated,² and they are made generally applicable to proceedings in chambers.

¹ 23d Order, October, 1852. *Cannon v. Evans*, 10 Hare, App. iii.

² Ante, p. 893 *et seq.*

By the 25th of the same Orders, "The practice of the Court with respect to evidence before the hearing, when applied to evidence to be taken before an Examiner in any cause subsequently to the hearing, is to be subject to any special directions which may be given in any particular case." In the absence of any such special directions, the 41st sect. of 15 & 16 Vict. c. 86, expressly directs, that "In cases where it shall be necessary for any party to any cause depending on the said Court to go into evidence subsequently to the hearing of such cause, such evidence shall be taken as nearly as may be in the manner hereinbefore provided with reference to the taking of evidence with a view to such hearing."

The manner in which evidence is taken before an Examiner has already been very fully pointed out; and the 26th Order of October, 1852, directs, that "Where a chief clerk is directed by the Judge to examine any witness, the practice and mode of proceeding is to be the same as in the case of the examination of witnesses before the Examiner, subject to any special directions which may be given in any particular case."

By the 27th of the same Orders, after the examination is over, "The original examination and depositions of parties and witnesses taken by or before the chief clerk, and authenticated by his signature, are to be transmitted by him to the Record and Writ Office, to be there filed; and any party to the suit or proceeding may have a copy thereof, or of any part or portions thereof, upon payment of the proper fee.

We have before seen that the chief clerk may summon parties or witnesses, and, when so directed by the Judge, may examine parties and witnesses, either upon interrogatories or *vivâ voce*. Moreover, parties and witnesses so summoned shall be bound to attend in pursuance of any such summons, and shall be liable to process of contempt, in like manner as parties or witnesses are now liable thereto in case of disobedience to any order of the said Court, or in case of default in attendance in pursuance of any order of the said Court, or of any writ of *subpœna ad testificandum*.¹

The preceding orders refer to the manner in which proceedings in general are conducted in chambers. It will now be convenient

¹ Sect. 31 of 15 & 16 Vict. c. 80.

to direct attention to certain particular matters frequently occurring in chambers. One of the most important duties heretofore performed by the Master, and now transferred to the Judge in chambers, is the taking of accounts.

Until recently the mode of taking accounts was by charge and discharge, state of facts and counter state of facts. This practice gave rise to great delay and expense, and frequently also to much injustice and hardship. The Commissioners recommended that the system should be abolished, and that an account should be taken in the same manner as it would be taken by a man of business. The accounting party should bring in his account and furnish a copy to the opposite party. The Commissioners also alluded to the great hardship of requiring in all cases strict vouchers for all items, and they recommended that the Court should have a discretionary power of giving special directions, with respect to the mode in which the account should be taken or vouched.

These recommendations of the Commissioners have been acted upon, and the 54th section of 15 & 16 Vict. c. 86, enacts, "That it shall be lawful for the Court in any case when any account is required to be taken to give such special directions (if any) as it may think fit with respect to the mode in which the account should be taken or vouched, and such special directions may be given either by the decree or order directing such accounts; and by any subsequent order or orders, when it appears to the Court that the circumstances of the case are such as to require such special directions; and particularly it shall be lawful for the Court, in cases when it shall think fit so to do, to direct that in taking the account the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections as they may be advised."

It must, however, be observed, that this section only applies where the vouchers have been lost and the accounts cannot be taken in the ordinary way. Such directions will not be given merely to save expense, nor when ordinary evidence can be had.¹

¹ *Lodge v. Pritchard*, 3 De Gex, Mac. & Gor. 906. Prior to the above enactment the Court would, if necessary, direct the Master to make a special report, in case he should be unable to take an account by reason of the non-production

It appears, however, that special directions as to the manner of taking accounts and receiving notice of accounts, as *prima facie* evidence, are not usually given at the hearing, but the Judge decides such questions in chambers.¹

The 29th and 30th Orders of October, 1852, further direct, with respect to the form of accounts, "that when any account is directed to be taken, the accounting party is, unless the Judge shall otherwise direct, to make out his account and verify the same by affidavit. The items on each side of the account are to be numbered consecutively, and the account is to be referred to by the affidavit as an exhibit, and to be left in the Judge's chambers."

"Any party seeking to charge any accounting party beyond what he has by his account admitted to have received, is to give notice thereof to the accounting party, stating, so far as he is able, the amount sought to be charged, and the particulars thereof in a short and succinct manner."

Perhaps the most convenient form of giving information as to the manner in which the accounts of the personal estate of a deceased person are in actual practice carried into the Judge's chambers, will be to set forth the specimen of an affidavit and account in the form now adopted.

They are as follows : —

Affidavit verifying Account of Personal Estate.

In Chancery.

(*Title.*)

We, A. B., of &c. —, C. D., of &c. —, and E. F. of &c. —, the above-named defendants, severally make oath and say as follows : —

1. We say that we have, according to the best of our knowledge, remembrance, information and belief, set forth in the first schedule hereunder written, a full, true and particular account and inventory of the personal estate of or to which G. H—, of books, or other circumstances; see *Rowley v. Adams*, 7 Beav. 395; *Millar v. Craig*, 6 Beav. 443; *Turner v. Corney*, 5 Beav. 515; and the Court would, it seems, declare that, for certain purposes, vouchers should not be required. *Adley v. The Whitstable Co.* 17 Vesey, 327. Since the enactment, it has been decided that no special directions will be given, except in cases of necessity, and where, unless such directions are given, the accounts required cannot be arrived at. See *Lodge v. Pritchard*, 3 De G., Mac. & G. 906; *Ewart v. Williams*, 7 ib. 68.

¹ Seton on Decrees, 34.

the testator in the decree (or order), dated —, made in this cause, named or referred to, and who died on the — day of —, was possessed or entitled at the time of his death, *and not by him specifically bequeathed*.¹

2. And we further say, that save what is set forth in the said first schedule, *and what is by the said testator specifically bequeathed*, the said testator was not, to the best of our knowledge, information or belief, at the time of his death, possessed of or entitled to any debt or sum of money due to him from us, or any or either of us, on any account whatsoever, nor to any leasehold or other personal estate, goods, chattels or effects, in possession or reversion, absolutely or contingently, or otherwise howsoever.

3. And we further say, that the said testator's funeral expenses have been paid, and that the same consist of the items of disbursement numbered — and —, in the account hereinafter referred to (or, if not paid it should be so stated, with the amount due and to whom due).

4. And we further say, that we have in the account marked (A.) now produced and shown to us, according to the best of our knowledge, information and belief, set forth a full, true and particular account of the personal estate of the said testator *not by him specifically bequeathed*,² which has come to our hands, or to the hands of any or either of us, or to the hands of any person or persons by our or any or either of our order, or for our or any or either of our use, with the times when, the names of the persons from whom, and on what account, the same has been received, and also a like account of the disbursements, allowances and payments made by us, or any or either of us, in respect of or on account of the said testator's funeral expenses, debts and personal estate, together with the times when, the names of the persons to whom, and the purposes for which, the same were disbursed, allowed or paid.

5. And we, each speaking positively for himself, and to the best of his knowledge and belief as to other persons, further say, that, save and except as appears in the said account marked (A.), we have not, nor hath any or either of us, nor have nor hath any other person or persons by our or any or either of our order, or

¹ The words in italics to be inserted only when the direction is to take an account of personal estate not specifically bequeathed.

² This should accord with the Order directing the account.

for our or any or either of our use, possessed, received or got in any part of the said testator's personal estate, nor any money in respect thereof; and that the said account marked (A.) does not contain any item of disbursement, allowance or payment other than such as has actually been disbursed, paid or allowed on the account aforesaid.

6. And we further say, that, to the best of our knowledge, information and belief the personal estate of the said testator now outstanding or undisposed of, consists of the particulars set forth in the second schedule hereunder written.

7. And we further say, that, save what is set forth in the said second schedule, there is not, to the best of our knowledge, information or belief, any part of the said testator's personal estate now outstanding or undisposed of.

The first Schedule above referred to.

1. £50 cash in the house.
2. £100 cash at the testator's bankers, Messrs. A. and B.
3. £1000 £3 per Cent. Bank Annuities standing in the testator's name.
4. £10 due from John James for half-year's rent of house at —, to Michaelmas, 1850.
5. £32: 6s. 8d. balance remaining due from John Thomas on account of half-year's rent of farm at —, to Michaelmas, 1850.
6. £300, a debt due from Samuel Jones on a bond with interest, from —, at — per cent.
7. A leasehold house situate at —, held under a lease for a term of —, which will expire on —, at a rent of £— a year, underlet to James Evans, for a term which will expire on —, at a rent of £50 a year.
8. £25, half-a-year's rent due from the said James Evans to —.

The second Schedule above referred to.

[The particulars to be set forth in the same manner as above.]

IN CHANCERY.]

(A.)
TITLE.

[ACCOUNT OF PERSONAL ESTATE.

This Account, marked (A.), was produced and shown to A. B., C. D., and E. F., and is the Account referred to in their Affidavit sworn this _____ day of _____, 18--.

Before me _____

RECEIPTS.

DISBURSEMENTS.

No. of Item.	Date when received.	Names of Persons from whom received.	On what Account received.	Amount received.		No. of Item.	Date when paid or allowed.	Names of Persons to whom paid or allowed.	For what Purpose paid or allowed.		Amount paid or allowed.	
				£	s. d.						£	s. d.
1	Jan. 5	- - - - -	Found in House - -	50	0 0	1	Jan. 6 1851.	James Price - -	Undertaker's Bill for } Funeral - - - - }		42	0 0
2	" 10	Evans & Co. - -	Balance at Bankers	100	0 0	2	Feb. 30	Messrs. A. & B.	Proctor's Bill for } Probate - - - - }		53	0 0
3	" 15	- - - - -	Half-year's Dividend } on £2,000 £3 per } cent. annuities due } 5th - - - - -	30	0 0	3	July 10	John George - -	A Debt due to him } for Medical At- } tendance - - - }		10	10 0
4	Feb. 10	John James - -	Half-year's Rent due } Michaelmas - - }	10	0 0	4	Dec. 20	James Price - -	Bond Debt of £1,000, } and £25 for Inter- } est thereon from } --- to --- - - }		1025	0 0
5	Mar. 18	Samuel Jones -	Bond Debt of £300 } and Interest from } --- to --- - - }	315	0 0							
6	June 10	James Evans - -	Half-year's Rent of } Leasehold House } due --- - - }	25	0 0							
7	Sept. 16	William Williams	Produce of Sale of } the above Lease- } hold House - - }	500	0 0							

NOTE.—This Account is not to be annexed to the Affidavit. Every Sheet and every alteration and erasure must be signed by the Officer before whom the Affidavit is sworn, otherwise the Account cannot be received. The Account is to be on Foolscap Paper, bookwise.

It will be observed, that by this practice the accounting party has the benefit of his own oath as to the sums he has received and the sums that he has paid. The change in the law, allowing all persons to give evidence in their own cases, has materially affected the position of accounting parties, and contributed greatly to the aid of justice. The manner in which the accounts of personal estate are carried in has been already stated, and it will be convenient here to give the form in which the accounts of real estate are also made out for the Judge or his chief clerk in chambers.

The following is a specimen of an affidavit¹ as to real estate, and verifying the account of rents and profits:—

In Chancery.

(*Title.*)

We, A. B., of &c. —, C. D., of &c. —, and E. F., of &c. —, the above-named defendants, severally make oath and say as follows:—

1. We say that we have, according to the best of our knowledge, remembrance and belief, set forth in the schedule hereunder written the particulars of all the real estate which G. H—, the testator in the decree [*or order*], dated — made in this cause named or referred, and who died on the — day of —, was seised of or entitled to at the date of his will and at the time of his death [*or, if the testator acquired any estates after the date of his will, as follows*,— in the first part of the schedule hereunder written the particulars of all the real estate which G. H— the testator, &c. (as above) was seised of or entitled to at the date of his will, and in the first and second parts of such schedule the particulars of all the real estate which the said testator was seised of or entitled to at the time of his death.]

2. And we further say, that save what is set forth in the said schedule the said testator was not, to the best of our knowledge, information or belief, at the date of his will or at the time of his death seised of or entitled to any real estate in possession, remainder or reversion, absolutely or contingently, or otherwise howsoever.

3. And we further say, that we have, according to the best of our knowledge, information and belief, set forth in the second schedule hereunder written the particulars of all the incumbrances affecting the said testator's real estate, and what part thereof such incumbrances respectively affect.

¹ The affidavit verifying an account is general. An additional affidavit to prove payment by an accounting party is requisite, which is specific.

IN CHANCERY.]

(B.)
TITLE.

[ACCOUNT OF RENTS AND PROFITS.]

This Account, marked (B.), was produced and shown to A. B., C. D., and E. F., and is the Account referred to in their Affidavit sworn this — day of —, 18—. Before me —

RECEIPTS.

DISBURSEMENTS.

No. of Item.	Date when received.	Names of Persons from whom received.	On what Account and in respect of what Part of the Estate received and when due	Amount re- ceived.		No. of Item.	Date when paid or allowed.	Names of Persons to whom paid or allowed.	For what Purpose paid or allowed.	Amount paid or allowed.	
				£	s. d.					£	s. d.
1	1851. Jan. 5	John James - - -	Half-year's Rent for Farm in Parish of —, due 29th September last - }	50	0 0	1	1851. Jan. 5	Sun Insurance Office - - - }	One Year's Insur- ance against Fire due - - - - }	5	0 0
2	Feb. 10	Thomas Jones - -	One Quarter's Rent of House at —, due 25th Decem- ber last - - - - }	10	0 0	2	Feb. 10	Thomas Carpenter	Repairs at John James's Farm - - }	15	8 0
3	Mar. 25	James Francis - -	Six weeks' Rent of Cottage at —, due to — this day - - - - }	3	0 0	3	Mar. 25	James Francis - -	Income Tax, Half- year due 10th Oc- tober - - - - }	0	15 0
4	July 5	John James - - -	Same as No. 1, due 25th March last - }	50	0 0						

NOTE. — This Account is not to be annexed to the Affidavit. Every Sheet and every alteration and erasure must be signed by the Officer before whom the Affidavit is sworn, otherwise the Account cannot be received. The Account is to be on Foolscap Paper, bookwise.

4. And we further say, that we have, in the account marked (B.) now produced and shown to us, according to the best of our knowledge, information and belief, set forth a full, true and particular account of all the rents and profits of the said testator's real estate, which has come to our hands or to the hands of any or either of us, or to the hands of any person or persons,¹ by our or any or either of our order, or for our or any or either of our use, and the times when, the names of the persons from whom, on what account, in respect of what part of such estate the same have been received and the times when the same became due, and also a like account of the disbursements, allowances and payments made by us or any or either of us in respect of the said testator's real estate, or the rents and profits thereof, and the times when, the names of the persons to whom, and the purposes for which, the same were made.

5. And we each speaking positively for himself, and to the best of his knowledge and belief as to other persons, further say, that, save and except as appears in the said account marked (A.), we have not nor hath any or either of us, nor have nor hath any other person or persons by our or any or either of our order, or for our or any or either of our use, possessed, received or got in any rents or profits of the testator's real estate nor any money in respect thereof, and that the said account marked (B.) does not contain any item of disbursement, payment or allowance other than such as has actually been disbursed, paid or allowed, as above stated.

The foregoing Orders, and the specimens of accounts with respect to real and personal estates, will be sufficient to suggest the manner in which accounts should generally be carried on. It may also be here observed, that by the 42d section of the 15 & 16 Vict. c. 80, it is enacted, that "It shall be lawful for the said Court, or any Judge thereof, in such way as they may think fit, to obtain the assistance of accountants, merchants, engineers, actuaries, and other scientific persons, the better to enable such Court or Judge to determine any matter at issue in any cause or proceeding, and to act upon the certificate of such persons;" and by the 43d section, "The allowance in respect of fees to such conveyancing counsel, accountants, merchants, engineers, actuaries,

¹ This should accord with the Order directing the account.

and other scientific persons, shall be regulated by the taxing master of the said Court, subject to an appeal to the Judge to whose Court the cause or matter shall be attached, which decision shall be final."

These provisions will give the parties the means of obtaining a satisfactory decision in cases of long and complicated accounts at a much less expense than what would be incurred by the ordinary process of adducing evidence, with respect to different items.

It will be convenient, in order to complete the subject of accounts, to state here the Order concerning the form of certificates and reports in cases where accounts have been directed.

The 44th Order, October, 1852, "Where an account has been directed, the certificate or report is to state the result of such account, and not to set the same out by way of schedule, but is to refer to the account verified by the affidavit filed, and to specify by the numbers attached to the items in the account which, if any, of such items have been disallowed or varied, and to state what additions, if any, have been made by way of surcharge. In any case in which the account verified by the affidavit has been so altered, that it is necessary to have a fair transcript of the account as altered, such transcript may be required to be made by the solicitor prosecuting the order, and is then to be referred to by the certificate or report. The accounts and the transcripts, if any, referred to by certificates or reports, are to be filed therewith, but no copies thereof are to be required to be taken by any party."

The last-mentioned Order relates exclusively to the form of certificates in cases where an account has been directed, but it will now be convenient to state the general rules with respect to the drawing up of certificates and reports by the Judge in chambers or his clerk. In the first place, the Act 15 & 16 Vict. c. 80, s. 32, following the recommendations of the Commissioners, enacts, that the directions to be given by the Master of the Rolls or any Vice-Chancellor for or touching any proceedings before his chief clerk, shall require no particular form, but the result of such proceedings shall be stated in the shape of a short certificate to the Judge, and shall not be embodied in a formal report, unless in any case the Judge shall see fit so to direct.

The two following Orders, 45 and 46 of the 16th October, 1852,

relate to the form of the certificates and reports to be made by the Judge's clerks : —

“The certificates or reports to be made by the chief clerk to the Judge are not, except the special circumstances of the case shall render it necessary, to set out the order, or any documents or evidence or reasons, but are to refer to the order, documents and evidence, or particular paragraphs thereof, so that it may appear upon what the result stated in any such certificate or report is founded.”

“The certificate of the chief clerk to the Judge may be in a form similar to the form set forth in Schedule (E.) to these Orders, with such variations as the circumstances of the case may require, and when prepared and settled, it is to be transcribed by the solicitor prosecuting the proceedings, in such form and within such time as the chief clerk shall require, and is then to be signed by the chief clerk at an adjournment to be made for that purpose. But where, from the nature of the case, the certificate can be drawn and copied in chambers whilst the parties are present before the chief clerk, the same shall be then completed and signed by him without any adjournment.”

A former Order, namely, the 48th of August, 1841, describes, with respect to the form of Masters' Reports, that “No part of any state of facts, charge, affidavit, deposition, examination or answer brought in or used before them shall be stated or recited.” The modern form of a certificate given in the schedule is as follows : —

Form of Certificate of Chief Clerk.

“In the matter of —, [*or, between —,*] [*state title.*] In pursuance of the directions given to me by the Master of the Rolls [*or, the Vice-Chancellor —*], I hereby certify, that the result of the accounts and inquiries which have been taken and made in pursuance of the order in this cause, dated the — day of —, is as follows : —

1. The defendants —, the executors of — the testator, have received personal estate to the amount of £—, and they have paid, or are entitled to be allowed on account thereof, sums to the amount of £—, leaving a balance due from [*or to*] them of £—, on that account.

The particulars of the above receipts and payments appear in the account marked —, verified by the affidavit of —, filed on

the — day of —, and which account is to be filed with the certificate, except that, in addition to the sums appearing on such account to have been received, the said defendants are charged with the following sums [*state the same here, or in a schedule*], and except that I have disallowed the items of disbursement in the said account numbered — and —.”

[*Or in cases where a transcript has been made.*]

“The defendants, —, have brought in an account verified by the affidavit of —, filed on the — day of —, and which account is marked —, and is to be filed with this certificate. The account has been altered, and the account marked —, and which is also to be filed with this certificate, is a transcript of the account as altered and passed.

2. The debts of the testator which have been allowed are set forth in the — schedule hereto, and, with the interest thereon and costs mentioned in the schedule, are due to the persons therein named, and amount altogether to £—.

3. The funeral expenses of the testator amount to the sum of £—, which I have allowed the said executors in the said account of personal estate.

4. The legacies given by the testator are set forth in the — schedule hereto, and with the interest therein mentioned remain due to the persons therein named, and amount altogether to £—.

5. The outstanding personal estate of the testator consists of the particulars set forth in the — schedule hereto.

6. The real estate to which the testator was entitled consists of the particulars set forth in the — schedule hereto.

7. The incumbrances affecting the said testator's real estate are specified in the — schedule hereto.

8. The defendants have received rents and profits of the testator's real estate, &c. [*in a form similar to that provided with respect to the personal estate.*]

9. The real estates of the testator directed to be sold have been sold, and the purchase-money, amounting altogether to £—, have been paid into Court.”

N. B. *The above numbers are to correspond with the numbers in the decree.*

After each statement the evidence produced is to be stated as follows : —

“The evidence produced on this account [*or inquiry*] consists of the probate of the testator's will, the affidavit of A. B. filed —, and paragraph No. — of the affidavit of C. D. filed —.”

The report having under the previous Orders been duly prepared and transcribed, it will be for the parties either to proceed to give it validity, or to take objections to it. The 33d section of 15 & 16 Vict. c. 80, has first to be considered. It is as follows:—
“No exceptions shall lie to any certificate or report of the chief clerk, although signed and adopted by the Judge; but any party shall, either during the proceedings before such chief clerk, or within such time after such proceedings shall have been concluded, and before the certificate shall have been signed and adopted, as the Lord Chancellor shall by any General Order direct, be at liberty to take the opinion of the Judge upon any particular point or matter arising in the course of the proceedings, or upon the result of the whole proceeding, when it is brought by the chief clerk to a conclusion.”

If, therefore, any party is dissatisfied with the judgment of the chief clerk, and desirous of submitting the matter to the Judge, the orders and statutes prescribe a very simple course for him to adopt. It is not necessary for him to carry in objections to the report. All that is required is, that, within four days after the signature by the chief clerk of the report, the party dissatisfied therewith should take out a summons to have the matter considered by the Judge himself. The 47th Order of the 16th of October, 1852, is as follows:—

“The time within which any party is to be at liberty to take the opinion of the Judge upon any proceeding which shall have been concluded, but as to which the certificate or report of a chief clerk shall not have been signed and adopted by the Judge, is to be four clear days after the certificate or report shall have been signed by the chief clerk.”

In computing these four clear days mentioned in this Order, Sundays and days on which the offices are closed will be included, unless the day of return falls upon them.¹ It would appear that the vacations are included, for an Order of the 26th July, 1853, directs, that “In the interval between the close of the sittings after any term, and the commencement of the sittings before, or at the beginning of the next ensuing term, any Judge of the

¹ See ante, 1339.

Court may sign and adopt any certificate made by the chief clerk of any other Judge. But in all cases in which any Judge signs and adopts a certificate, made in pursuance of an order made by any other Judge, it is to be expressed that he does so for such other Judge, and such certificate shall in all future proceedings be deemed to be signed and adopted by the Judge for whom it is signed and adopted, save that no application to discharge or vary such certificate is to be made to the Judge for whom the same is signed and adopted without the leave of the Judge by whom it had been signed and adopted; and the Judge by whom it has been signed and adopted is to have the same power to discharge or vary the certificate as he would have had if it had been made in pursuance of an order made by himself."

Moreover, by the 2d Order of June, 1854, "Any Judge of the Court whose chambers may be open for business during any vacation may issue summonses for the purpose of any proceeding before the Master of the Rolls or any Vice-Chancellor at chambers after the vacation."

The 48th and 49th Orders of 16th October, 1852, carry out the practice, and are as follows:—

"Any party desiring to take the opinion of the Judge, as mentioned in the last preceding rule,¹ is, within four clear days after the certificate or report shall have been signed by the chief clerk, to obtain a summons for such purpose."²

"At the expiration of four clear days after the certificate or report shall have been signed by the chief clerk, if no party has in the mean time obtained a summons to take the opinion of the Judge thereon, the chief clerk is to submit the certificate or report to the Judge for his approval; and the Judge may thereupon, if he approve the same, sign such certificate or report in testimony of his adoption thereof, as follows:—'Approved, this — day of —.'"

If, however, the certificate be adopted and signed by the Judge in chambers, a party dissatisfied therewith has still an opportunity of bringing the matter fully before the open Court, in the most simple and summary form, namely, by motion. In the first place the 34th section of the Act to abolish the office of Master,³ enacts that, —

¹ See 47th Order, above.

² These Orders, 47, 48, and 49, are not to apply to certificates on passing Receivers' accounts, Order 53, October, 1852; and post, Chapter on Receivers.

³ 15 & 16 Vict. c. 80.

“When any certificate or report of the chief clerk shall have been signed and adopted by the Judge, the same shall be filed in like manner as reports are now filed, and shall thenceforth be binding on all the parties to the proceedings, unless discharged or varied, either at chambers or in open Court, according to the nature of the case, upon application by summons or motion, within such time as shall be prescribed in that behalf by any General Order of the Lord Chancellor; and nothing herein contained shall prejudice or affect the power of the Court at any time to open any such certificate or report upon the same or the like grounds as any report of a Master of the said Court, which has been absolutely confirmed, may now be opened.”

To carry out this enactment, the 50th Order of October, 1852, directs, with respect to the filing of the certificate or report, that “The certificate or report, when signed by the Judge, with the accounts, if any, to be filed therewith, is to be transmitted by the chief clerk to the Report Office, to be there filed.”

The 51st Order prescribes the time within which the application to discharge or vary a certificate is to be made, and is as follows: — “The time within which an application may be made by summons or motion to discharge or vary any certificate or report which has been signed and adopted by the Judge sitting in chambers, is to be eight clear days after the filing of such certificate or report.”

As the application may, by the terms of this Order, be either by motion or summons, it may be either in chambers or in open Court. If, however, the application be made first in chambers, it is not of course to permit a motion in Court. If the party wishes to appeal, the course appears to be to apply to the Court below to make an order without argument in conformity with that made in chambers *pro formâ*, and from that order a motion by way of appeal may be made.¹ When, however, an important decision in the cause has been made in this manner in chambers, the Lords Justices have commented upon an appeal against such a decision coming on as a motion.

We have seen, that, as a general rule, the Judge must sign a report to give it validity. The 32d section of 15 & 16 Vict. c. 80,

¹ Douthwaite v. Spensley, 18 Beav. 70; Morgan v. Hatchell, 19 Beav. 86; York Railway v. Hudson, 17 Jur. 1090; Sandens v. Druce, 5 Drew. 139; Rhodes v. Ibbotson, 4 De Gex, M. & G. 787.

enacts, "That when the Judge shall approve of the certificate or report, he shall sign the same in testimony of his adopting the same."

There is an exception to this rule, for the 43d Order of October, 1852, directs, that "In cases where the Court directs any computation of interest, or the apportionment of any fund which is to be acted upon by the Accountant-General or other person, without any further order from the Court, the order to be made by the Court may direct such computation or apportionment to be made by one of the chief clerks attached to the Court of such Judge, and may direct the certificate thereof, signed by such chief clerk, to be acted upon accordingly, without the same being signed and adopted by the Judge."

It will be observed, that, if it is intended that the signature of the Judge may be dispensed with, an order to that effect from the Court must be obtained.

The 52d Order directs, that "Certificates of the chief clerk, made as mentioned in Rule 43, and not required to be signed and adopted by the Judge, are to be transmitted and filed in the same manner as those signed and adopted by the Judge."

It now appears as if the practice of acting upon these certificates, without the signature of the Judge, would not frequently be acted upon, as the 4th Order of June, 1854, directs, that, "In all cases in which the certificate of the chief clerk is to be acted upon by the Accountant-General of the Court without any further order, such certificate may be signed and adopted by the Judge on the day after the same shall have been signed by the chief clerk, unless any party desiring to take the opinion of the Judge thereon obtains a summons for that purpose before twelve of the clock on that day; and the time for applying to discharge or vary such certificate, when signed and adopted by the Judge, is to be two clear days after the filing thereof."

In the administration of the estate of a deceased person, it is usual and necessary for advertisements to be published, calling in all the claimants upon the estate, or creditors, next of kin, or otherwise. For this purpose certain General Orders direct the manner in which the advertisements shall be published, and also the manner in which the parties interested may come in and prosecute their claims.

With respect to advertisements, the following Orders prescribe precisely the form and the manner in which they are to be issued : —

The office fee for the advertisements at the Judge's chamber is 1*l.*, and the solicitor's fee for preparing it 6*s.* 8*d.*¹

The solicitor should keep the papers when the advertisements appear as vouchers for his costs.

The 33d Order of 16th October, 1852, directs, that "Where advertisements are required for any purpose a peremptory and only one is to be issued, unless for any special reason it may be thought necessary to issue a second advertisement or further advertisements; and any advertisement may be repeated as many times and in such papers as may be directed."

By the 34th of the same Orders, "The advertisements are to be prepared by the solicitor, and submitted to the chief clerk for approval, and, when approved, are to be signed by him, and such signature is to be sufficient authority to the printer of the 'Gazette' to insert same."

The 35th Order then directs, that "Advertisements for creditors or other claimants are to fix a time for the creditors or claimants to come in and prove their claims, and to appoint a day for the hearing and adjudicating thereon, and may be in a form similar to the form set forth in Schedule (D.) to these Orders, with such variations as the circumstances of the case may require."

The form of advertisement given by the Orders is as follows : —

"Pursuant to a Decree or Order of the High Court of Chancery, made in a cause

against

the creditors of [*or* persons claiming debts, *or* liabilities affecting the estate of, *or* the persons claiming to be next of kin to, *or* the heir of, as the case may be], —, late of —, in the county of —, who died in or about the month of —, are by their solicitors, on or before the — day of —, to come in and prove their debts or claims at the chambers of the Master of the Rolls, in the Rolls Yard, Chancery Lane [*or*, of the Vice-Chancellor —, No. —, — Square, Lincoln's Inn], Middlesex, or in default thereof they will be peremptorily excluded from the benefit of the said decree [*or* order].

¹ See post, Chapter on Fees and Costs.

“Monday, the — day of —, at — o'clock in the — noon, at the said chambers, is appointed for hearing and adjudicating upon the claims.

“Dated this — day of —, 1852.

A. B.,
Chief Clerk.”

The advertisement is thus prepared by the solicitor, submitted by him to the chief clerk, who will fix the days, and direct in what papers it shall be inserted, and sign the advertisement.

The following Orders prescribe the course to be taken by the persons who, not being parties to the suit, come in under the decree, in consequence of the advertisements issued or otherwise : —

In the first place, claimants should recollect, that under the 9th Order of 16th October, 1852, “Where any order is made directing an account of debts, claims or liabilities, or an inquiry for next of kin or other unascertained persons, unless otherwise ordered, all persons who do not come in and prove their claims within the time which may be fixed for that purpose by advertisement, are to be excluded from the benefit of the order.”

The 36th Order directs, that “Claimants coming in pursuant to advertisement are to enter their claims at the chambers of the Judge in the ‘Summons and Appointment Book,’ for the day appointed for hearing by the advertisement, and are to give notice thereof and of the affidavit filed to the solicitors in the cause, within the time specified in the advertisement for bringing in claims.”

This Order appears to contain all that is requisite in the first instance on the part of the claimant. The affidavit will simply state his claim, and may be sworn before the chief clerk, and must then be filed at the Record and Writ Clerks' Office. The party prosecuting the cause or matter should keep an office copy, as under the next Order and also the 42d, he may be called upon to produce them.

The following Order, the 37th, is, “That the claimants filing affidavits are not to be required to take office copies; but the party prosecuting the cause or matter is to take office copies, and produce the same at the hearing, unless otherwise ordered in chambers.”

It appears that the duty of keeping the requisite papers ready for the prosecution of the cause in the Judges' chambers falls upon the solicitor of the party prosecuting the cause or matter. The affidavits are filed at the Record and Writ Clerks' Office.

With respect to the hearing of the claims, the 38th and following Orders direct that —

“If on the day appointed for hearing the claims there are any not then disposed of, an adjournment day for hearing such claims is to be fixed; and where further evidence is to be adduced, a time may be named within which the evidence on both sides is to be closed, and directions may be given as to the mode in which such evidence is to be adduced.”

“Any claimant who has not before entered his claim may be heard on such adjournment day, provided he enters his claim and files his affidavit four clear days prior to such day, and no certificate of debts or claims shall in the mean time have been made.”

“Creditors claiming debts not exceeding 5*l.* need not attend on the day of hearing, unless required to do so by notice from some party.”

The result of this Order is, that all debts under 5*l.* will be allowed unless express notice is given to the claimants of the intention to dispute them. The party prosecuting the suit or matter must therefore examine all the debts of this description, and determine whether notice of objection should be given. A fee for this investigation is provided for.

By the 41st of the same Orders, “After the time fixed by the advertisement, no claims are to be received except as before provided in case of an adjournment, unless the Judge at chambers shall think fit to give special leave, upon application made by summons, and then upon such terms and conditions as to costs and otherwise as the Judge shall think fit.”

This Order renders it most expedient that every person having a claim should bring it in before the time fixed by the advertisement. He cannot calculate on an adjournment until the 39th Order, and if he delays till after the time limited he will have to pay the costs caused by his delay.

By the 42d of the same Orders, “A list of all claims allowed shall, when required by the Judge, be made out and left in the Judge's chambers by the party prosecuting the order.”

As the onus of making out this list is to fall entirely upon the

party prosecuting the order, it need scarcely be stated that the solicitor must be very particular at the hearing of every claim to indorse on the claim how it is dealt with, and to be sure that his indorsement is identical in effect with the minute made by the Judge's clerk.

Before leaving this subject it will be convenient for the practitioner to set out the forms that are actually now in practice in making out the lists. They are as follows:—

JAMES v. JONES.

LIST OF DEBTS.

No. of Entry of Claim.	Names of Creditors.	Addresses.	Amounts allowed for Principal, Interest and Costs.			Total Amounts due.		
			£	s.	d.	£	s.	d.
2	James Allen - -	Boston, in the County of Lincoln, Surgeon - } Interest - - - - - } Costs - - - - - }	100	0	0	106	2	0
			4	0	0			
			2	2	0			
1	Charles Cohen -	98, Piccadilly, in the County of Middlesex, Gentleman, Executor of John Thomas - - } Interest from 5th October, 1850, at £ 5 per Cent. - - } Costs - - - - - }	67	0	0	73	4	0
			4	2	0			
			2	2	0			
5	John Dennis and Owen Thomas.	16, Fleet Street, London, Grocers and Co-partners - - - - - } Interest from 16th October, 1852, at £ 5 per Cent. - - } Another Debt - - - } Interest - - - - - } Costs - - - - - }	100	0	0	171	14	6
			5	0	0			
			62	0	0			
			2	10	0			
			2	4	6			
			Total £					

NOTE. — The names are to be inserted alphabetically.

Where the debt does not carry interest, but interest is allowed under the 10th General Order of 16th October, 1852, it is to be stated as in the first Example above. If the debt carries interest, the rate and time from which it is computed is to be stated, as in the second Example.

As in all cases the interest is computed to the date of the certificate this need not be stated.

When there are both specialty and simple contract debts, separate lists are to be prepared.

LIST OF LEGACIES.

	Names of Legatees.	Descriptions.	Amounts of Principal and Interest.	Total Amounts due.
			£ s. d.	£ s. d.
	James Oliver - -	Son of Testator, an Infant - - - - - } Interest - - - - -	100 0 0 7 5 6	107 5 6
	Mary Russell - -	20, Cheapside, London, } Widow - - - - - } Interest from 1st } January, 1850, the } death of the Tes- } tator - - - - - }	50 0 0 4 8 4	
	Jane, the wife of John Williams, Esq. - - - - -	Lincoln - - - - - Paid in part. - - - - - Interest - - - - -	250 0 0 50 0 0 200 0 0 14 11 0	54 8 4 214 11 0
			Total £	

NOTE. — Where the interest is to be computed from the end of one year after testator's death it is to be stated as in the first Example above. If otherwise, the time from which it is payable is to be stated. As in all cases interest is computed to the date of the certificate, this need not be stated.

LIST OF ANNUITIES.

	Names of Annuitants.	Description of Annuitants and Nature of Annuities.	Amounts of Annuities.	Amount of Arrears due.
			£ s. d.	£ s. d.
	Mary Jones - -	Spinster, Daughter of Testator, during her Life - - - - - }	50 0 0	25 0 0
	Maria Williams -	Widow of Testator, during her Life and Widowhood - - - - - }	200 0 0	
		Arrears due from 7th Aug., 1852, down to which it has been paid - - - - - }	- - - -	300 0 0
		Totals £		

NOTE. — The arrears to be explained as in the second Example, if due from any other period than that of testator's death.

APPORTIONMENT.

	Names of Creditors.	Addresses.	Amounts before certified to be due, and subsequent Interest.	Totals due.	Amounts Apportioned.
			£ s. d.	£ s. d.	£ s. d.
	John Jones - - -	20, Cheapside, London, Woollen-dra- per - - - - -	200 0 0		
		Subsequent Interest	17 10 0	217 10 0	57 4 8
	Thomas Smith & John Roberts -	35, Aldermanbury, London, Mercers and Copartners -	100 0 0		
		Subsequent Interest	8 15 0	108 15 0	27 12 4
	Mary Williams -	Braintree, in the County of Essex, Widow, Black- smith - - - - -	75 0 0		
		Subsequent Interest	7 0 0	82 0 0	25 0 0
	Thomas Young & Robert Young -	Braintree aforesaid, Executors of Wil- liam Young, de- ceased - - - - -	200 0 0		
		Subsequent Interest	17 10 0	217 10 0	57 4 8
				Total £	

NOTE. — The names of the creditors to be stated in same order as in the certificate from which they are taken.

The computation of interest upon debts and legacies is another material portion of the duty of the chief clerk in chambers, under a decree for the administration of the estate of a deceased person.

This duty was formerly specially directed by the decree, but it is now provided for by General Orders.

The 10th Order of 16th October, 1852, directs, that “Where an order is made directing an account of the debts of a deceased person, unless otherwise ordered, interest is to be computed on such debts as to such of them as carry interest after the rate they respectively carry, and as to all others after the rate of four per cent per annum, from the date of the order.”

With respect to specialty debts no question can in general arise; the rate of interest will generally appear on the instrument by which they are created.

It would appear, however, that with respect to bond debts interest cannot usually be calculated beyond the amount of the penalty.¹

With respect to judgment debts, the 1 & 2 Viet. c. 110, s. 17, enacts, that "Every judgment debt shall carry interest at the rate of four per cent from the time of entering up the judgment, or from the time of the commencement of the Act (in cases of judgments then entered up and not carrying interest), until the same shall be satisfied."

With respect to legacies, the 11th Order of 16th October, 1852, directs, that "Where an order is made directing an account of legacies, unless otherwise ordered, interest is to be computed on such legacies after the rate of four per cent per annum, from the end of one year after the deceased's death, unless any other time of payment or rate of interest is directed by the will, and in that case according to the will."

With respect to the costs of persons coming in to establish their claims under a decree, the general rule is, that next of kin going in to prove their right pay the expenses of so doing; but that if, after having established their claims, they are permitted to mix in the cause as if they had been parties, then in respect of such proceedings they may be entitled to their costs²; but with respect to creditors, the 47th Order of August, 1841, amended by 6th Order, April, 1842, and 12th Order, October, 1842, directs, "That a creditor, who has come in and established his debt before a Master, under a decree or order in a suit, shall be entitled to the costs of so establishing his debt, and the sum to be allowed for such costs shall be fixed by the Master without taxation at the time the Master allows the debt of such creditors, unless the Master shall think that such costs ought to be taxed in the regular mode, and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established."

In addition to this Order, the 55th Order of 16th October, 1852, directs, that "Parties attending any proceeding in chambers, without having previously obtained the leave of the Judge to allow the same, are not to be allowed any costs of such attendance unless by special order of the Court." We have seen, that the

¹ *Crosse v. Bedingfield*, 12 Sim. 35; but see *Jewdine v. Agate*, 3 Sim. 129.

² *Waite v. Waite*, Mad. & Geld. 110; *Harvey v. Harvey*, *ibid.* 91; *Watkins v. Maule*, Jac. 107.

Judge himself usually fixes, in the first instance, who are to attend the proceedings. This order of course does not apply to persons summoned to attend, nor to claimants coming in under advertisements, so far as the establishment of their rights is concerned.

The 56th Order directs, that "Costs of counsel attending the Judge in chambers are not in any case to be allowed, unless the Judge certifies it to be a proper case for counsel to attend."

In general, when counsel are employed, the matter is heard in open Court.¹

SECTION II.

Sale of Estates.

It is not within the limits of this treatise to state the various occasions when a Court of Equity will order a sale of real estate.² Whenever such a step is necessary for administering the estate of a testator, or in any manner carrying out the decree of the Court, the sale is directed, and the order is carried into effect under the superintendence of the Judge or his clerk in chambers. It was not usual, previous to the recent Act for amending the practice of the Court of Chancery, for the Court to direct the sale of real estate upon the first hearing in any suit for the administration of the estate of a deceased person. Such an order was made on further directions, when the necessity for a sale had been established by the Master's report. The Court, however, may now direct a sale of real estate, if it appear desirable, at any time after the institution of the suit, even without a decree.³ For the 55th section of the 15 & 16 Vict. c. 86, is as follows: — "If, after a suit⁴

¹ *Hudson v. Carmichael*, 18 Jur. 852.

² On a reference to a Master in a suit for partition, to ascertain whether a sale is necessary, the question for the Master to decide is, whether the value of the whole property would be materially diminished; and not whether it would be for the benefit of the parties, to turn the estate into money. *Clason v. Clason*, 6 Paige, 541. *Primâ facie* a tenant in common is entitled to an actual partition, and his co-tenant seeking a sale, must show the necessity thereof. *Davis v. Davis*, 2 Ired. Ch. 607.

³ *Prince v. Cooper*, 16 Beav. 546.

⁴ The word "suit" applies to a claim as well as to a bill.

shall have been instituted in the said Court in relation to any real estate, it shall appear to the Court that it will be necessary or expedient that the said real estate or any part thereof should be sold for the purposes of such suit, it shall be lawful for the said Court to direct the same to be sold at any time after the institution thereof, and such sale shall be as valid to all intents and purposes as if directed to be made by a decree or decretal order on the hearing of such cause; and any party to the suit in possession of such estate, or in receipt of the rents and profits thereof, shall be compelled to deliver up such possession or receipt to the purchaser or such other person as the Court shall direct."

Such an application for an immediate sale will not be granted if it appears to have been made for the purpose of trying some disputed point, and not in consequence of the necessity for an immediate sale.

It does not appear that this section gives to the Court jurisdiction to sell real estate in cases where no such jurisdiction existed before the Act;¹ and this consideration is important to a purchaser, inasmuch as he must satisfy himself, not only that the title is good, but also that the Court had jurisdiction to direct the sale. Thus we have seen² in *Calvert v. Godfrey*,³ where a sale of an infant's estate was ordered, merely because it was beneficial to the infant, and without there being any person who had a right to call upon the Court to sell the estate for the satisfaction of a claim or debt, it was held that the sale was not within the jurisdiction of the Court, and an objection to the title was allowed. The 48th section of the 15 & 16 Vict. c. 86, does, however, in the case of mortgage estates, give to a Court of Equity additional jurisdiction for the sale of real estates.⁴

A sale under the direction of the Court is generally conducted by the solicitor for the plaintiff; and he is, in all questions which may arise between the purchaser and the vendor, to be considered as the agent of all the parties to the suit.⁵

As a general rule a party to the cause is not allowed to become

¹ *Mandeno v. Mandeno*, 1 Kay, App. xxv.

² Ante, p. 160.

³ 6 Beav. 106; *Lechmere v. Brasier*, 2 J. & W. 287.

⁴ On this section, see *Hurst v. Hurst*, 16 Beav. 372; *Wickham v. Nicholson*, 19 Beav. 38; *Jones v. Baily*, 17 Beav. 582; *Wayn v. Lewis*, 1 Drew, 487.

⁵ *Dalby v. Pullen*, 1 R. & M. 296; *Dale v. Hamilton*, 10 Hare, App. vii.

a purchaser at a sale under the order of the Court ; but an order, giving leave to a party to the cause to bid and become a purchaser, may be obtained from the Court and inserted in the decree ;¹ or, if this be omitted, an order to the like effect may be obtained from a Judge at chambers, on notice to the other parties to the suit. Leave, however, will not be given to the particular party having the conduct of the suit,² nor to an executor of the testator,³ or a receiver.⁴

Where an estate, or other property, is directed to be sold to the best bidder, it is usually sold by public auction, unless the Court or the Judge in chambers specially directs that a different method of disposing of the property shall be adopted, which it will sometimes do, under circumstances which will be hereafter pointed out.

By the 12th Order of 16th October, 1852, where any order is made directing any property to be sold (unless otherwise ordered), the same is to be sold, with the approbation of the Judge to whose Court the cause or matter is attached, to the best purchaser, to be allowed by him, and all proper parties are to join therein as he shall direct. Consequently the precise direction in the decree to the effect formerly given is now omitted.

The Judge in chambers may now, when any property is directed to be sold, order the same to be sold at such place, either in London or in the country, as he shall think fit.⁵

Before a sale can take place, certain steps must be taken by the party conducting the sale, with the approbation of the Judge or his chief clerk. The abstract of title must be investigated, the particulars and conditions of sale must be settled, and the estate must be duly advertised.

With respect to the preparation and examination of the abstract, the 15 & 16 Vict. c. 86, s. 56, enacts, that " Before any estate or interest shall be put up for sale under a decree or order of the Court of Chancery, an abstract of the title thereto shall, with the approbation of the Court, be laid before some conveyancing counsel to be approved by the Court, for the opinion of such counsel

¹ Seton on Decrees, 609.

² *Domville v. Barington*, 2 Y. & C. 724, Exch. Rep.; *Sidney v. Ranger*, 12 Sim. 118; *Ex parte M'Gregor*, 4 De G. & Sm. 603.

³ *Geldard v. Randall*, 9 Jur. 1085.

⁴ *Alvin v. Bond*, 1 Hare & K. 196.

⁵ Orders of 16th July, 1851, and 58th Order of 16th October, 1852.

thereon, to the intent that the said Court may be the better enabled to give such directions as may be necessary respecting the conditions of sale of such estate or interest, and other matters connected with the sale thereof; and when an estate or interest shall be so put up for sale, a time for the delivery of the abstract of title thereto to the purchaser or his solicitor shall be specified in the said conditions of sale."

In order to carry out this and similar provisions in the Act, power was given by the 41st section of the 15 & 16 Vict. c. 80, to the Lord Chancellor, to nominate not less than six conveyancing counsel, to whom business of this description should be referred. Accordingly, six gentlemen have been appointed as conveyancing counsel to the Lord Chancellor, among whom the first or other clerks to the registrars distribute the business by rotation.

The rota is kept secret, but the clerk who distributes the business keeps a record of the references, with proper indexes.

When the Court, or a Judge sitting at chambers, shall direct any business to be referred to any such conveyancing counsel, a short memorandum or minute of such direction is to be prepared and signed by the Registrar, if the same shall have been given in Court, or by the Judge's chief clerk if given in chambers; and the party prosecuting such his claim, or his solicitor, is to take such memorandum or minute to the Registrar's clerk, whose duty it shall be to make such distribution as aforesaid; and such clerk is to add at the foot thereof a note specifying the name of the conveyancing counsel in rotation to whom such business is to be referred; and such memorandum or minute is to be left by the party prosecuting such direction or his solicitor with such conveyancing counsel, and shall be a sufficient authority for him to proceed with the business so referred.

The Court or Judge may make a reference to any one in particular of the conveyancing counsel, where the circumstances of the case may in his opinion render it expedient.¹

By a notice at the Registrar's office, the above-mentioned memorandum or minute of the direction to refer any business to conveyancing counsel, is to be taken by the party prosecuting the matter, or his solicitor, to the Registrar's office, between the hours of eleven and one o'clock, to the gentleman nominated for the

¹ Orders of 16th December, 1852, and see *De Caddick's Settlement*, 9 Hare, App. ix.; *Harvey v. Brook*, 9 Hare, App. xi.

purpose, who will put the name of the conveyancing counsel in rotation on such memorandum or minute.

By the 40th section of 15 & 16 Viet. c. 80, if any party desires to object to the opinion of the conveyancing counsel, the point is disposed of by the Judge in court or chambers, according to the nature of the case.

It may be convenient to set forth here the following Order of the 24th December, 1852, concerning the costs of references to conveyancing counsel, which, under the 43d section of 15 & 16 Viet. c. 80, are regulated by the Taxing Master, subject to an appeal to the Judge, to whose Court the cause is attached, whose decision is to be final. When, in pursuance of any direction by the Court or Judge, drafts are settled by any of the conveyancing counsel under 15 & 16 Viet. c. 80, s. 41, the expense of procuring such drafts to be previously or subsequently settled by other counsel is not to be allowed on taxation as between party and party, or as between solicitor and client, unless the Court shall specially direct such allowance. This intimation, however, is not to prevent the allowance of the expenses in cases which may have already occurred, when in the judgment of the Taxing Master there has been a reasonable ground for laying the papers before other counsel.

The party conducting the sale will, under the foregoing Orders, proceed to lay the abstract of the title in the lands to be sold before one of the conveyancing counsel of the Court, unless, under special circumstances, such a reference be dispensed with. The particulars and conditions of sale are prepared in the usual manner for the sale of estates, and are not necessarily referred to counsel. The particulars and conditions of sale usually constitute one document, and are intituled in the cause. They are settled and allowed by the Judge's clerk in chambers. If reserved biddings are intended, the fact should be mentioned in the conditions. By General Orders of July, 1851, a power was conferred upon the Masters, which may now be exercised by the Judge in chambers, to fix reserved biddings, the amounts to be paid by way of deposit, to appoint a time for payment of deposits into Court, and to receive proposals for sale of the property by private contract either before or after putting it up to sell by public auction.¹

¹ See *Pym v. Insall*, 10 Hare, App. lxxiv.

When the abstract has been investigated¹ and the particulars and conditions of sale drawn up and settled, the sale must be duly advertised, and with that view the party conducting the sale must prepare an advertisement, and obtain the approval and signature of the chief clerk to it. When the form of advertisement is settled, it must be inserted in such newspapers as the Judge in chambers or his chief clerk may direct, — usually the *London Gazette*, or one or more provincial papers.

We have already seen that the Judge in chambers or his clerk has power, if it be deemed advisable, to fix a reserved bidding or reserved biddings. If this course be deemed advisable, evidence by affidavit will be required to prove the amount that ought to be paid as the reserved bidding upon each lot, to which this mode of sale is intended to apply.

We have also seen that the Judge or his clerk may order the sale to take place where or by whom he thinks fit.² It is not usual to pay the auctioneer a percentage, but the terms between him and the party conducting the sale are arranged previously with the approbation of the Judge's clerk.

When the sale takes place, the auctioneer prepares what is called a bidding paper for the signature of the purchasers. A printed paper of instructions as to the conduct of the sale is usually given to him from the chief clerk.

The best bidder being declared the purchaser, must, in addition to the signature of his name after his bidding, add his description and place of abode. If he buys as agent, he signs A. B., agent for C. D., of —, &c.³

¹ The following is the form of order used for referring an abstract to conveyancing counsel: — “The Vice-Chancellor — has directed that an abstract of the title to the estates by the — of — 18—, in this cause directed to be sold, and which are comprised in the particulars to which I have put my initials, be laid before the conveyancing counsel in rotation for his opinion thereon with a view to such sale, and to advise what, if any, special conditions of sale are rendered necessary or proper by the state of the title, and that such special conditions (if any) be settled by such counsel.

Dated this — day of — 18—.

— Chief Clerk.”

² Order 16th July, 1851, ante, p. 1366.

³ The following form is that in which the bidding paper is drawn up: —
In Chancery.

— against —

This bidding paper marked B. was produced and shown to —, and is the
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The same process is gone through with respect to all the other lots; and if any lots are not sold, they must be again advertised for sale. If reserved biddings have been fixed, and the sum bid does not amount to the sum named, the lot is of course not sold. After the sale an affidavit is prepared by the solicitor for the party conducting the sale, which generally states that the deponent proceeded to sell the estate, according to the printed particulars and conditions of sale thereof settled and allowed, and specifies where and when the sale took place; and that he has annexed a schedule, containing a full and true account of all and every sum and sums of money which was or were bid for the said lots respectively, and also the names of all and every the persons and person who attended at the said sale, and bid for the lots respectively (this schedule is, generally, the original paper upon which the biddings taken at the sale were put down, and signed by the bidders); and he further swears that the respective sums lastly set down as being the highest bidding for the said lots, were the highest and largest sums that were offered and bid for the same respectively at the said sale, and verifies the handwriting of the highest bidder to each lot, and that the whole of the sale was conducted by him, the deponent, in a fair, open and candid manner.

It is not usual, in sales of estates under the decrees of the Court, to require the purchaser to make any deposit. It is, however, sometimes done: and it seems that, in cases where timber upon an estate is sold separately from the estate itself, the practice is to require a deposit; the conditions of a sale usually providing, that same as is referred to in his affidavit sworn this — day of —, one thousand eight hundred and —, before me, —.

We whose names are hereunder subscribed respectively bid at the sale by auction in the above cause, on the — day of —, one thousand eight hundred and —, the sums set opposite to our respective names for and became the purchasers of the respective lots specified in the particulars produced at such sale, the numbers of which are set opposite to our respective names, subject to the conditions also produced at such sale.

Number of Lot.	Amount of Highest Bidding.	Signatures of the Purchasers of the Lots sold.	Purchasers' Address and Quality.
1			

the purchaser of each lot shall sign an agreement for the performance of the conditions, and pay one third of the amount of the purchase-money, (or a certain percentage upon its amount,) in cash or Bank of England notes, at the time of the sale, to the person appointed to sell.

The Judge or his clerk is, however, expressly authorized to fix an amount to be paid as deposit by the purchasers, and to appoint a person to receive the same, who may be required to give security.¹

In ordinary sales by auction, or by private agreement, the contract is complete when the agreement is signed; but a different rule prevails in sales before a Judge in chambers; in such cases, the purchaser was not formerly considered as entitled to the benefit of his contract till the Master's report of the purchaser's bidding is absolutely confirmed, and is not now, until eight days after the certificate of the purchase has been signed by the Judge in chambers.²

The following is the form of certificate made by the chief clerk, after which the contract will be deemed complete:—

“The —— of ——, the testator intestate, in the said —— named, directed to be sold, have been offered for sale in —— lots, by public auction, with the approbation of the said Judge, subject to a reserved bidding for each lot fixed by the said Judge, and according to certain particulars and conditions of sale, and the several persons named in the first column of the first schedule hereto were the highest bidders for, and they are allowed by the said Judge to be the purchasers of, the respective lots set opposite to their respective names in the second column of the said first schedule, at the prices or sums set opposite to their respective names in the third column of the said first schedule.”³

¹ Orders 16th July, 1851, and 16th October, 1852.

² *Bridger v. Penfold*, 1 K. & J. 28.

³ The other and subsequent proceedings in regard to the sale of estates under the superintendence of a Judge and his clerk at chambers, according to the present English practice, are almost identical with those formerly pursued in sales of property in the Master's office; to these the reader is referred ante, 1264.

SECTION III.

Of the Production of Documents.

It has always been the practice of the Court of Chancery, before the hearing of a cause, to allow a plaintiff to move for the production of documents relevant to the matters in question, which have been admitted by the defendant's answer to be in his possession or power. This power to order the production of documents arose out of that general jurisdiction for the purpose of discovery which has in proceedings in Equity constituted a peculiar and important feature; and, in some instances, formed the very foundation for the interference of the Court. The manner of exercising this jurisdiction has been very much simplified by the recent changes in the practice of the Court, but the principles by which it is regulated still remain the same.¹

Formerly, an order on behalf of a plaintiff to compel a defendant to produce documents could only be obtained by a motion in Court, and it was incumbent upon the plaintiff in the first place to show an admission by the defendant of the possession of the particular document sought to be produced.² The 18th section of 15 & 16 Vict. c. 86, now enacts, that "It shall be lawful for the Court, upon the application of the plaintiff in any suit in the said Court, whether commenced by bill or by claim, and as to a suit commenced by bill, whether the defendant may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents, to make an order for the production by any defendant, upon oath, of such of the

¹ Previous to the final hearing of a cause, the Court orders the production of books and papers, only upon two principles; security pending the litigation, and discovery or inspection, for the purposes of the suit in Court. *Watts v. Lawrence*, 3 Paige, 159.

² In a bill for discovery and production of deeds, it is absolutely necessary to charge that the deeds have come to, or are in the hands of, the defendant. *Hough v. Martin*, 2 Dev. & Bat. Eq. 226. When the plaintiff alleges that he has never seen the original deed against which he seeks relief, and prays that the same may be produced for his inspection, the defendant is not bound to make the deed part of his answer, or annex it to it. The plaintiff must, in such case, obtain an order from the Court for the production of the deed; which order, if disobeyed, will put the defendant in contempt, and by consequence prevent him from making any motion in the cause. *Smith v. Thomas*, 2 Dev. & Bat. Eq. 126.

documents in his possession or power relating to matters in question in the suit, as the Court shall think right; and the Court may deal with such documents when produced in such manner as shall appear just."

It will be observed, that the documents to be produced are such as the Court shall think right, and there is no doubt that the Judge in chambers, who now exercises this discretion, will act in accordance with the previously decided cases.

It will be convenient, first, to set forth the manner in which the jurisdiction is carried into effect. In the first place, the 15 & 16 Vict. c. 80, s. 26, expressly includes applications for production of documents among the business to be transacted in chambers.

The plaintiff therefore commences by taking out a summons, and serving it on the defendant.

The following is the form of summons:—

In Chancery.

Let all parties concerned attend at my chambers, —
Middlesex, on —, the — day of —, 18—, at —
of the clock in the — noon, on the hearing of an ap-
plication on the part of —, for production by the —
upon oath of documents relating to the matters in ques-
tion in this cause.

Dated this — day of —, 18—.

This summons was taken out by — of —, so-
licitor for —.

To —.

Upon the hearing of the summons, if the defendant has answered, the question for the Judge will be the same as it was formerly on a motion in Court, and it appears that different forms of objection may be taken to the order. First, that the plaintiff is seeking discovery not relevant to his case, that is to say, that he is requiring something beyond that to which the rules of the Court entitle him.

Secondly, it may be objected that even supposing the documents to be relevant to the plaintiff's case, and such as he might have an interest in inspecting, still that the defendant is exempted from their production by some particular circumstances arising out of the nature of the documents themselves.

Thirdly, there may not be a sufficient admission of the possession of the documents by the defendant, or there may not be a

sufficiently accurate description of them to enable the Court to make any order for their production.

If the defendant has not answered, and does not intend to answer, the plaintiff may nevertheless obtain an order for production of documents, but he must first obtain an order from the Judge for the defendant to make an affidavit concerning the documents in his possession.

This practice will be best explained by setting out the form of affidavit which the defendant must make. It is as follows:—

In Chancery.

Between, &c.

I — of — make oath and say, as follows:—

1. I say I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto annexed.
2. I further say, that I object to produce the said documents set forth in the second part of the said first schedule hereto.
3. I further say,
 . (State upon what grounds the objection is made, and verify the facts so far as may be.)
4. I further say, that I have had but have not now in my possession or power the documents relating to the matters in question in this suit, set forth in the second schedule hereto annexed.
5. I further say, that the last-mentioned documents were last in my possession or power on (state when).
6. I further say,
 (State what has become of the last-mentioned documents, and in whose possession they now are.)
7. I further say, according to the best of my knowledge, remembrance, information and belief, that I have not now, and never have had, in my own possession, custody or power, or in the possession, custody or power of my solicitors or agents, or solicitor or agent, or in the possession, custody or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in

this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

NOTE. — If the party denies having any, he is to make an affidavit in form of the 7th paragraph, omitting the exception.

After a defendant has filed an affidavit in the foregoing form, his case stands relative to the question of the production of documents in the same state as if he had answered, and any of the three objections before mentioned¹ may be urged to the order on production.

The two former of the above objections, namely, that the plaintiff is seeking discovery beyond what his general right entitles him to, and that the documents in question are specially exempted, are not confined to motions for the production of documents; but are objections that may also be urged against the disclosure of facts in the answer. They arise out of the general principles relating to the right of discovery in Equity. The last objection has reference peculiarly to motions for the production of documents. Moreover, as in all cases the burden is upon the plaintiff, so to make out his case as to preclude an objection of this kind from being raised, it is desirable, in the first instance, to consider objections of this last description. The points to be determined are, what is a sufficient admission of possession by the defendant? What constitutes a sufficient description of them to entitle the plaintiff to move for their production? And how he may establish these facts to the satisfaction of a Court?

As a general rule, the plaintiff must be able to read from the answer or affidavit an admission that the documents for which the motion is made are in the defendant's possession² at the time when the motion is made.³ In the case of *Story v. Lord J. G. Lennox*,⁴ Lord Cottenham granted the motion for the production of documents, making, however, the following observations: — “When

¹ Ante, p. 1374.

² *Darwin v. Clarke*, 8 Ves. 158; *Erskine v. Bize*, 2 Cox, 226; *Gibbens v. Ogden*, Halst. Dig. 174. A reference to documents is not sufficient without an admission that they are in the custody or power of the defendant. *Gibbens v. Ogden*, *supra*; *Watson v. Renwick*, 4 John. Ch. 383.

³ *Heeman v. Midland*, 4 Mad. 391; *Haverfield v. Pyman*, 2 Phil. 202; *Scott v. Wheeler*, 12 Beav. 366.

⁴ 1 Mylne & Craig, 534.

the motion was argued before me by way of appeal, it occurred to me that there might be some doubt whether the answer contained a sufficient admission to entitle the plaintiffs to move for the production of the documents in question. To entitle the plaintiffs to an order for that purpose, they must show an admission that the documents which they seek to inspect are in the possession of the defendant, and that they are of a nature to entitle the plaintiffs to an inspection of them; and where an answer is framed so as to meet the form of words commonly used in the interrogatory for that purpose, no question of this kind can arise; but in this case the defendant has not answered the interrogatory except by making his statement as to the documents in the two schedules, and then denying in the words of the interrogatory the possession of any others, so that it is by implication only, and not by any direct admission, that the plaintiffs can show by the answer that the documents fall under the description contained in the answer."

It has always been incumbent upon the plaintiff to show an admission of possession of the required documents by the defendant, and it does not appear that this practice is altered, though now the admission may be by affidavit of the defendant, and not by answer.¹

If the documents are in the hands of an agent of the defendant against whom the motion is made, the principle of the Court is, that the possession of the agent is the possession of the defendant himself.² It seems, however, necessary, that the person in whose custody the documents are, should hold them exclusively for the defendant, against whom the motion is made; for, according to Lord Cottenham, "when documents are stated in the answer to be in the possession of *A. B. and C.*, you cannot order that *A.* shall produce them, and that for the best possible reason, namely, that he could not produce them";³ and, upon the same principle, where the person who holds them is the agent of other persons as well as the defendant, against whom the motion is made, it seems that no order can be made for the production of such doc-

¹ *Barnett v. Noble*, 1 J. & W. 227; *Lamb v. Orton*, 1 Drew, 414.

² *Murray v. Walter*, 1 Cr. & P. 125; *Morrice v. Swaby*, 2 Beav. 500; *Wright v. Mayer*, 6 Ves. 281; *Fenwick v. Read*, 1 Mer. 114; *McCann v. Bruce*, 1 Hogan, 129; *Eager v. Wiswall*, 2 Paige, 369; *Glyn v. Caulfield*, 3 Mac. & G. 463.

³ Cr. & Ph. 124; and see *Airey v. Hall*, 2 De G. & Sm. 489; *Reid v. Langlois*, 1 Mac. & Gor. 627; *Morrell v. Wooten*, 13 Beav. 105.

uments.¹ This principle, however, does not extend so as to exonerate a defendant from making a discovery of any knowledge he may be able to obtain by inspecting documents in the joint possession of himself and others. The case of *Taylor v. Rundell*² has been before the Court upon several occasions, and the unanimous opinions of the different Judges explain very clearly the principles upon this point.

In that case, the plaintiff was the executor of the lessee of certain mines. The bill was for an account. The defendants were the lessees of the mines; they were also directors of the association for working the mines, and proprietors and shareholders in the concern. Under these circumstances the defendants represented that they were unable, without the inspection of certain documents, to give any further information than they had already done; that such documents were in the possession of the secretary and under the joint control of themselves and their co-directors of the mining association, and that the other directors refused to allow the defendant to inspect them. The question was, whether this was a sufficient examination; Lord Lyndhurst held that it was not, for as directors they had a right to the inspection of the documents at any time, the possession of the secretary was their possession, and their co-directors had no right to exclude them.

Lord Cottenham, in the same case,³ exhibits very clearly the difference between ordering a defendant to produce a document in which he has only a joint possession with others, and ordering a defendant to disclose the result of his inspection of documents, which, though not in his exclusive possession, he is still entitled to peruse, saying — “It is true, that the rule of the Court adopted from necessity, with reference to the production of documents, is, that if a defendant has a joint possession of a document with somebody else who is not before the Court, the Court will not order him to produce it, and that for two reasons; one is, that a party will not be ordered to do that which he cannot or may not be able to do;⁴ the other is, that another party not present has an interest in the document which the Court cannot deal with; but the rule does not apply to discovery, in which the only question is, whether,

¹ See, however, the case of *Walburn v. Ingleby*, 1 My. & K. 61. and the observations of Lord Cottenham thereon in *Murray v. Walter*, C. & P. 125.

² Cr. & Ph. 104; 1 Ph. 222; 1 Y. & C. 128; 11 Sim. 391.

³ Cr. & Ph. 111; but see *Walburn v. Ingleby*, 1 M. & K. 61.

⁴ *Princess of Wales v. Earl of Liverpool*, 1 Swanst. 123, and 1 Wils. 113.

as between the plaintiff and the defendant, the plaintiff is entitled to an answer to the question he asks ; for if he is, the defendant is bound to answer it satisfactorily, or at least show the Court that he has done so as far as his means of information will permit."

It seems, however, that although where a defendant has not the exclusive right to the possession of a document, the Court will not order its production by him, yet if the exclusive right to the possession is only prevented by the document being retained by an agent or solicitor, then the Court will order production by the defendant, taking care to give him sufficient time to compel the delivery from the person wrongfully retaining it.¹ The consequence of this rule is, that it is not usually necessary to make an attorney a party to a suit, because he has the title-deeds of a defendant in his possession, although it seems that it may become so under particular circumstances. Generally speaking, and *prima facie*, it is certainly not necessary to make an attorney a party to a bill seeking a discovery and production of title-deeds merely because he has them in his custody, since the possession of the attorney is the possession of the client ; but cases may arise where such a proceeding becomes advisable, as if the attorney withholds the deeds in his possession, and will not deliver them to his client on his applying for them.²

Lastly, it may be observed that the mere circumstance of the documents being abroad, is no answer to a motion for their production ; but in such a case, reasonable time will be given the defendant to bring them to this country, and if he does not comply with the order, it will be considered the same as if he had had them in the first instance, and had refused to produce them.³

The plaintiff having shown that the answer or affidavit contains a sufficient admission of the possession of documents, it is next incumbent upon him to show that they are sufficiently described so as to enable the Judge to make an order for their production.⁴

¹ Taylor v. Rundell, 1 Ph. 225 ; Cr. & Ph. 113 ; see, also, Lopez v. Deacon, 6 Beav. 254.

² Fenwick v. Read, 1 Mer. 125 ; Richardson v. Hastings, 7 Beav. 354 ; Brown v. Perkins, 2 Hare, 540.

³ Farquharson v. Balfour, 1 T. & R. 190 ; Freeman v. Fairlie, 3 Mer. 44 ; Eager v. Wiswall, 2 Paige, 369.

⁴ 14 Ves. 213 ; Gibbens v. Ogden, Halst. Dig. 174 ; Watson v. Renwick, 4 John. Ch. 383. Exceptions for insufficiency of answers to interrogatories as to documents are, under the new practice, discouraged. 10 Hare, App. xx.

In addition to other reasons for compelling documents to be described in the answer, it seems necessary that there should be an adequate description of them for the purpose of enabling the Judge, in the event of its ordering production, to determine afterwards whether due compliance with its order has been made by the defendant.

The next subject for investigation is, what is the nature of the right of the plaintiff to the documents themselves, or his interest in inspecting them, which will induce the Court at his request to order the defendant to produce them? This right or interest it is incumbent on the plaintiff to establish, and failing to do so, the defendant may object to the production upon the ground that this right or interest is not shown.¹

It has been before stated, that the defendant may also urge special grounds of exemption as reasons why the motion should not be granted; the onus, however, of proving such objections to the required discovery rests upon the defendant, and the whole subject, which is one of considerable difficulty, will be rendered more intelligible by carefully keeping in mind the distinction between such objections as relate to a defect in the establishment of his own right to the production by the plaintiff, and such objections as relate to the proof by the defendant of any special ground of objection.

It will be convenient, first, to consider the right or interest in the document which the plaintiff must show. In general this right or interest is sufficiently established by an admission of the defendant's, that the documents in question are relevant to the plaintiff's case.

In the case of *Smith v. Duke of Beaufort*,² Sir J. Wigram, V. C., observes, "That, according to his apprehension of the practice of the Court, an admission in general terms that the documents in the schedule are relevant to the plaintiff's case, throws upon the defendant who makes that admission the onus of excusing himself from producing the documents in the schedule." The answer in that case admitted that the documents in the schedule were relevant to the plaintiff's case, and that admission taken alone, in his opinion, *prima facie*, entitled the plaintiff to inspect them.³

¹ See *Gibbens v. Ogden*, Halst. Dig. 174; *Watson v. Renwick*, 4 John. Ch. 383.

² 1 Hare, 519.

³ See also *Tyler v. Drayton*, 2 S. & S. 310; *Attorney-General v. Thompson*, 8 Hare, 106.

A question that excited considerable interest some years ago occurred in the case of *Adams v. Fisher*,¹ showing whether a defendant can protect himself from the production of documents by denying the title of the plaintiff.

It is not necessary now to detain the reader with an elaborate discussion of this case, but it may be mentioned that Sir J. Wigram, V. C., in his "Points on the Law of Discovery"² elaborately criticises the decision in this case, and considers it as introducing an exception to the general rule, which entitles a plaintiff to discovery in support of his own case.

Lord Lyndhurst, in the case of *Lancaster v. Evors*,³ had to determine whether the authority of *Adams v. Fisher*⁴ would extend so as to exonerate a defendant, who stated by his answer that he was a purchaser for a valuable consideration, from giving a discovery of the sums that he had paid for his incumbrances. Lord Lyndhurst held that he must answer fully.⁵

There does not seem to be any other case tending to establish a distinction between the right of a plaintiff in obtaining a discovery by motion for the production of documents, and his right to obtain discovery directly upon the answer. Indeed, in general, it has been the practice of the Court to test the right of the plaintiff to the production of documents, by considering whether he could have compelled the defendant to set out their contents upon his answer.

As the motion has always been made exclusively upon the admissions of the defendant, it seems clear, that if the defendant positively deny the possession of documents relative to the plaintiff's case, no order for production can be made.

The degree of interest which the plaintiff must have in the documents, the production of which he requires, is exhibited by an observation of Sir John Leach, V. C., which is frequently quoted, namely, that the Court makes interlocutory orders for production only upon two principles, security pending litigation, and discovery for the purposes of the suit.⁶

¹ 3 M. & C. 526.

² Page 91.

³ 1 Ph. 352; and see *Hue v. Richards*, 2 Beav. 306; *Somerville v. Mackay*, 16 Ves. 382.

⁴ *Ubi supra*.

⁵ 1 Ph. 353.

⁶ *Lingen v. Simpson*, 6 Mad. 290; *Lady Beresford v. Driver*, 14 Beav. 387.

Cases of some difficulty under this head occur in suits to set aside deeds or legal instruments upon the ground of fraud or other equitable circumstances. In such cases the question arises, whether the plaintiff has a right to the production of the instrument impeached by the bill?

In the case of *Bassford v. Blakesley*,¹ Lord Langdale, M. R., said, "I perfectly agree that where a bill alleges that deeds have been obtained by fraud, and the answer entirely denies the fraud and states the deeds, the plaintiff is not, in that situation of things, entitled to an order for their production. On the other hand, it is not necessary, in order to entitle the plaintiff to the production of the deeds, that the defendant should admit that there has been fraud. The Court must look to the circumstances of each case;" and in the case then before him, he made an order for the production of the deeds that were impeached.²

Another case (in which the plaintiff, having some interest in the documents sought to be produced, has not that kind of right which entitles him to their production) exists when the required documents are not wanted for the purpose of proving the plaintiff's right to a decree, but for the purpose of carrying into effect the decree sought to be obtained. Cases of this kind must be distinguished from those where the documents are required for a *subordinate* point in the decree, but still for a point in the decree. In the cases now considered, the discovery is supposed to be not for the purpose of determining in any respect what the decree is to be, but for the purpose of enabling the plaintiff to carry it into execution. Under these circumstances there is clearly no reason why the plaintiff should inspect the documents before the hearing of the cause.³

Lastly, before leaving this branch of the subject, it is desirable to mention, that in many cases the extent of discovery to which a plaintiff, at any particular period of the course, is entitled, depends upon the state of the pleadings. Thus, if a demurrer to the whole

¹ 6 Beav. 131; and see *Gill v. Eyton*, 7 Beav. 155; *Follett v. Jefferies*, 1 Sim. N. S. 1; *Neate v. Latimer*, 2 Y. & C. Exch. Rep. 257; 4 Bligh. 149; *Pilking-ton v. Himsworth*, 1 Y. & C. Exch. Rep. 612; *Castor v. Goetze*, 2 Keen, 581, and observations upon these cases in *Wigram on Discovery*, p. 227.

² It is the practice of the Court to order deeds and papers contested as false and fraudulent to be brought into Court for inspection. *Apthorpe v. Comstock*, 1 Hopk. Ch. 144; S. C. 8 Cowen, 386.

³ *Wigram on Discovery*, p. 211.

bill be put in, as such a state of the record in itself is an admission of every fact properly pleaded in the bill, the plaintiff has no right to any discovery; consequently no motion for the production of documents can be made. So, also, if the defendant pleads a pure affirmative plea, that is, if the defendant admits the whole case made by the bill, but states some fact not in any manner denied by the bill as a defence to the whole case, then the plaintiff has no right to discovery.¹ There is, however, frequently considerable difficulty in determining with precision what degree of discovery a plaintiff is bound to afford upon a special state of the pleadings. Under the present practice, the plaintiff is entitled to apply for an order as against a defendant who has not answered, but it does not appear that this change in the practice will affect the above-mentioned principle by which the Court has been hitherto guided.

We now come to a consideration of those objections to motions for the production of documents which arise out of the peculiar nature of the documents themselves. With respect to objections of this kind, inasmuch as they usually depend upon some special immunity of the defendant with reference to the discovery sought to be obtained, the onus of proving the immunity is thrown upon the defendant making the objection. The first objection of this kind to be considered is, that the required documents relate exclusively to the defendant's title and not to the plaintiff's case.² If they relate both to the plaintiff's case and also to the defendant's, then it seems that, even though they be the very foundation of the defendant's title, still they must be produced.³

We have before seen that the plaintiff has no right *à priori* to the production of documents not evidencing his own case, and the last sentence shows that as to documents which do evidence his own case he is entitled to their production, even though they be the title of the defendant. The objection, therefore, that documents relate exclusively to the title of the defendant is really included in the objection heretofore considered, that the required documents do not relate to the plaintiff's case. When, however, a motion is in fact made for the production of documents which

¹ Ante, p. 631.

² Story Eq. Pl. § 858, 859.

³ Smith v. The Duke of Beaufort, 1 Hare, 507; 1 Ph. 209; Burrell v. Nicholson, 1 M. & K. 680; Wright v. Vernon, 1 Drew. 344.

relate to the defendant's title and not to the plaintiff's case, the objection is usually stated in the form of a special exemption of the defendant, exonerating him from the production of his title-deeds, and not in the more general form that the documents required do not evidence the plaintiff's case.

The case of *Bolton v. The Corporation of Liverpool*¹ is a leading authority upon this subject. In that case, on a bill of discovery in aid of the defence to an action brought by a corporation for the recovery of town dues, the defendants by their answer admitted that they had in their custody, relating to the matters mentioned in the bill, certain grants and deeds, which they alleged were the title-deeds and documents evidencing and showing the title of the corporation to the town and lordship of Liverpool, and to the town dues and customs. A motion for the production of these, amongst other documents, was first made before Sir L. Shadwell and refused.²

A similar motion by way of appeal was made before Lord Brougham,³ who thus stated the principle: — "A party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title, and which form part of his adversary's. He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary."⁴ Those under which both claim he may have, or those under which he alone claims. Thus, an heir-at-law cannot in that character call for the general inspection of deeds in the possession of a devisee.⁵ The plaintiff here does not claim anything positively or affirmatively under the documents in question; he only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can these documents prove his title? Only by disclosing some defect in that of the corporation. The description of the documents is, that they rebut or negative the plaintiff's title; they are the corporation's title, and not his, and they are only his negatively by failing to prove that of the corporation. He rests on

¹ 1 M. & K. 88.

² 3 Sim. 467.

³ 1 M. & K. 88.

⁴ Story Eq. Pl. § 858, 859.

⁵ See *Lady Shaftesbury v. Arrowsmith*, 4 Ves. 66.

the right which he has in common with all mankind, to be exempt from dues and customs, and he says, prove me liable if you can. The corporation have certain documents which they say prove this liability. He cannot call for the documents merely because they may, upon inspection, be found not to prove his liability, and so to help him, and hurt his adversary, whose title they are."

The authority of this case has never been disputed, and the grounds of distinction between it and the case of *Smith v. Duke of Beaufort*¹ exhibit the principles of the Court upon this subject. In that case, also, the bill was for discovery in aid of an action at Law. The subject of the action at Law was the claim of the Duke of Beaufort to a sum of 4*l.* for every wey of coal raised in a particular manor.

A motion for the production of these documents was made before Sir James Wigram, V. C. The judgment is too long to be quoted, but the following passage will exhibit the principle upon which the production was ordered: "The plaintiff by his bill has made three specific points, which I have already noticed. No one of these points, nor the conclusion to which they lead can with any approach to accuracy of language be described as an estate, right or title of or belonging to or claimed by the plaintiff. The answer denying only that the documents relate to any estate, right or title of or belonging to or claimed by the plaintiff may be studiously evasive. The fact is, that the plaintiff has no case to establish except a negative of the defendant's claim, and the three points he makes by his bill constitute a case by way of evidence only leading to that negative. The plaintiff then has a right to all such discovery as will enable him to prove that case, and consistently with the answer the documents may do that."²

In conclusion, his Honor said, "That his judgment proceeded upon this, that the admission of relevancy *primâ facie* entitled the plaintiff to inspect the documents, and that the protection which the duke claimed was not claimed in terms sufficiently definite and precise to entitle him to that protection." A similar motion was made by way of appeal before Lord Lyndhurst and refused upon the same principles.

¹ 1 Hare, 507; and see *City of London v. Thompson*, 3 Sw. n.

² See, also, *Bannatyne v. Leader*, 10 Sim. 230; *Harris v. Harris*, 3 Hare, 179; *Marquis of Bute v. Glamorganshire Canal Company*, 1 Ph. 681; *Stainton v. Chadwick*, 3 Mac. & Gor. 578; *Cannock v. Jauncey*, 1 Drew, 497.

On the other hand, when there is nothing in the nature of the suit to lead to a supposition that the required deed will evidence the plaintiff's case, and it appears to be the defendant's title, it is clear that no order will be made for its production ; thus in *Lloyd v. Wait*,¹ where a party claiming as heir to a mortgagor filed a bill to redeem, and the answer denied his title as heir, it was held, that he must establish his title before he could see the deed ; " that is, he must first show that he has an interest in the deed."

Another question upon this branch of the subject was formerly much discussed, namely, if a defendant states in his answer that he has in his possession a document relating to his own title, and refers to it for greater certainty of its contents, whether the mere fact of that reference will entitle the plaintiff to its production ? It is not probable that this question will occur under the present practice, so that it will be sufficient to refer to the cases,² and to quote the following passage from a judgment of Lord Cottenham : " Where a party has thought proper to put his defence upon a particular document, he himself having introduced it and put it forward, he cannot be permitted to make any representation of it, however unfounded, which he pleases ; but the plaintiff is entitled to see whether the defendant has rightly stated it. It is because the defendant chooses to make it part of his answer that the plaintiff is entitled to see it, not because the plaintiff has an interest in it. The principle is, that a defendant shall not avail himself of that mode of concealing his defence."³

In the case of *Latimer v. Neate*,⁴ Lord Cottenham also urges upon the House of Lords as one of the grounds for confirming

¹ 12 Sim. 103 ; see *Hue v. Rickards*, 2 Beav. 305 ; and *Glegg v. Legh*, 4 Mad. 493 ; and see the judgment of Sir J. L. Knight Bruce, V. C., *Combe v. Corporation of London*, 1 Y. & C. 651 ; and S. C. 4 Y. & C. 139, Exch. Rep.

² *Hardman v. Ellames*, 2 M. & K. 745 ; *Bettison v. Faringdon*, 3 P. Wms. 364 ; *Peile v. Stoddart*, 1 Mac. & Gor. 192.

³ *Adams v. Fisher*, 3 M. & C. 548. The mere statement of a document in the answer which the defendant is not bound to produce will not entitle the plaintiff to production. *Glover v. Hall*, 2 Ph. 484. Story Eq. Pl. § 859, 860, 860 a, and notes. It is a matter of course to allow the plaintiff to inspect the books and papers of the defendant referred to in his answer, and thus made a part thereof. And the defendant may be compelled to produce them within a reasonable time, although they are in the hands of his agent in a foreign country. *Eager v. Wiswall*, 2 Paige, 369.

⁴ 11 Bligh. 149, and *Wigram on Discovery*, 352. See the observations on this case in *Glover v. Hall*, 2 Phil. 484.

the judgment, "because the defendant, having set out what he states as the contents of the deed, (and most likely fairly,) the plaintiff under those circumstances is entitled to see whether the abstract be or not a correct abstract of those deeds of which he asks the production." And in the case of *Phillips v. Evans*,¹ the Vice-Chancellor, Knight Bruce, seems to rely partly upon the manner in which the document was set out.

The next special exemption from discovery which may be urged by a defendant as an objection to a motion for the production of documents arises out of the privilege extended to professional communications.² In a former part of this work,³ it has been found necessary to treat upon this subject with reference to the right of a defendant to demur to discovery sought from him, or to decline giving it by answer. There does not seem to be any difference as to the extent to which this privilege is conceded when the question arises upon motions for the production of documents, and when it arises upon exceptions to an answer, or upon a demurrer to a discovery.

In cases when opinions of counsel have been taken by a trustee on behalf of a *cestui que trust*, and paid for out of the trust fund, there is no doubt that the *cestui que trust* is entitled to call for their production; but opinions taken in the party's own behalf, and adversely to another, are protected.⁴

There are certain other objections which a defendant is entitled to raise as a protection from discovery. Thus the plaintiff cannot extract from the defendant an answer tending to involve him in a criminal charge.⁵ Neither can he succeed if the proposed discovery will subject the defendant to penalty or forfeiture. With respect to objections of this kind, the principles also are precisely the same when the question arises upon a motion for the production of documents, as when it occurs upon a demurrer to the discovery or exception to an answer, so that it is now only necessary to refer

¹ 2 Y. & C. 647.

² *Wright v. Mayer*, 6 Sumner's Vesey, 280, a note (a), and cases cited; 1 Greenl. Ev. § 241.

³ Ante, p. 599; and see the cases of *Gore v. Bowser*, 5 De G. & Sm. 30; *Glyn v. Caulfield*, 3 Mac. & Gor. 453; *Manser v. Dix*, 1 Kay & J. 456; *Russell v. Jackson*, 9 Hare, 390.

⁴ *Woods v. Woods*, 4 Hare, 83; *Warde v. Warde*, 3 Mac. & Gor. 370; *Dehaynes v. Robinson*, 20 Beav. 42.

⁵ *Rice v. Gordon*, 13 Sim. 580.

the reader to the chapter where the subject has been before discussed.¹

An opinion seems to be generally prevalent that in the case of mortgagor and mortgagee, there is some difference in the manner in which the foregoing principles concerning the production of documents are applied. As it does not seem very clear what is the precise nature of the distinction, or indeed whether there is any difference further than what arises naturally from the particular circumstances of the case, it will be necessary shortly to call attention to the peculiarities resulting from the rights in Equity of a mortgagor and mortgagee in this respect, and the authorities upon the subject.

In an ordinary suit for redemption, where there is no dispute concerning the fact of the mortgage, the right of the plaintiff to come into Equity after the stipulated day for payment, is in consequence of the estate of the mortgagee being absolute at Law. Under such circumstances, the plaintiff relies for equitable relief upon the fact, that his legal estate is gone ; if then the defendant does not dispute the plaintiff's equity, but only claims to hold the estate as a security for the debt, it seems reasonable that the Court should not, before the decree which insures the defendant either his money or the estate, allow the plaintiff to inspect the mortgage deed. Otherwise the effect of such inspection might be to enable the plaintiff to detect flaws in the defendant's legal estate, and thus use the interference of a Court of Equity for the destruction of that legal estate, the assumed indefeasibility of which constituted his sole right to sue. Where, however, the defendant does not submit to be redeemed, but, denying that he is a mortgagee, claims to hold the estate free from any equity of redemption, it does not seem very clear what there is in the nature of the dispute between the parties to vary the ordinary rights of the plaintiff to a discovery of all that evidences his own case.² It would seem strange if the person in possession of the estate, disavowing the character of mortgagee, and refusing to receive payment of the alleged mortgage, could at the same time assert the right of a mortgagee and claim to withhold production of the deed until payment had been made.

In the case of *Phillips v. Evans*,³ a further charge made by

¹ Ante, p. 589, *et seq.*

² See the case of *Latimer v. Neate*, 2 Y. & C. 262, Exch. Rep. & 11 Bligh, 149 ; *Wigram on Discovery*, 287 ; *Jones v. Jones*, 1 Kay, App. vi.

³ 2 Y. & C. 647.

indorsement, upon the mortgage deed, was impeached upon the ground that it was made when the mortgagee had notice of the insolvency of the mortgagor, and the bill charged that such notice would appear from recitals in the writing of further charge from the date thereof, and from the indorsements upon the original indenture. Upon a motion for the production of the mortgage deed, Sir J. L. Knight Bruce, V. C. said, "This is a bill filed to redeem a mortgage, and it is not disputed that the only question is what amount the plaintiff is to pay, which depends on the contents of the indorsement on the mortgage deed, and the time when the indorsement was executed. The defendant sets out the instrument, which appears to be expressed in the first person, and to be contained in a few lines, which, he says, are the effect of that instrument. Considering the manner in which the document is set out, the nature of the suit, and the circumstances relating to the insolvency of the mortgagor, including the date of the indorsement, I think that this is a case in which the plaintiff should see the indorsement."

We have before seen that the application for production of documents is now made to a Judge in chambers, before whom counsel will not usually be heard, but who will adjourn the question for decision in open Court, if any question of difficulty arises.

If the application for production be granted, the 57th Order of 16th October, 1852, directs with respect to the place of deposit, "Where any deeds or other documents are ordered to be left or deposited, the same are to be left or deposited in the Record and Writ Office, and are to be subject to such directions as may be given for the production thereof." Under the former practice, deeds were deposited with the Record and Writ Clerks, when the order was made before the hearing, and were deposited in the Master's office, when the order was made after the hearing.

By the 8th Order of October, 1842, "Any Clerk of Records and Writs being required to attend with any record or document at any assizes, or at any Court or place out of the Court of Chancery, or the offices thereof, shall be entitled to require that the solicitor or party desiring such his attendance shall deposit with him a sufficient sum of money to answer his just fees, charges and expenses in respect of such attendance, and to undertake to pay any further such fees which may not be answered by such deposit."

After the order is made the defendant must deposit the deeds

with the Clerk of Records and Writs, in whose division the suit is, together with a schedule. He is responsible for their safe custody, and upon notice will produce them in Court or before the Examiner. Of course the fact of a deed or other document being proved in the cause and referred to in the depositions, does not give to the other side any right to inspect it before the hearing.

The effect of an order against the defendant for the production of documents is only to give the plaintiff the power of inspecting and taking copies of them. It does not make the documents evidence in the cause, unless the mere circumstance of their coming out of the custody of the defendant would, in itself, render them admissible evidence. If, therefore, the plaintiff wishes to have them proved in the cause, or to have them produced at the hearing, it is necessary that it should be so expressed in the order for production. The order for production, in itself, establishes that the documents came out of the defendant's custody into the hands of the officer of the Court, so that it is not necessary for the purpose of proving this fact to read any portion of the answer.¹

We have seen that the usual order directs the documents to be left with the Clerk of Records and Writs; and it would appear that the Court has never ordered production at any other place, except upon the consent of the person in whose possession they are.² Upon the application, however, of the defendant, the Court has frequently ordered production at some other place for the sake of convenience, and the same practice is still continued at chambers, as a form of order is given for the production of documents at the solicitor's office.

In the case of *Crane v. Cooper*, Lord Cottenham said, that "It was now a well-established rule that if a defendant stated that those books and papers were in constant use in his business, and necessary for that purpose, the Court would, in the first instance, give credit to that statement, and order that they should be produced to plaintiffs at the place of business at which they were in use; and that if the plaintiff did not obtain a satisfactory inspection of them there, it was open to him to come to the Court for a further order." Acting upon this principle, the Court will also order the production of them at the place of business of the defendant's solicitors; but as such an order is made for the defend-

¹ *Taylor v. Salmon*, 3 M. & C. 422.

² *Maund v. Allies*, 4 M. & C. 503.

ant's convenience, the Court will not allow his solicitors to make any charge against the plaintiff for inspecting them.¹ Nor are the solicitors entitled to insist upon making, and charging for, any copies that may be required of the deeds deposited with them, so that, according to Sir James Wigram, V. C., "so much difficulty might arise from making the order in that form, as to render it generally the better rule, that the order should be in the common form, namely, for the production of the documents at the office of the Court, in which case any variation, for the convenience of the parties, might be made a matter of arrangement between them."

The order is in the form, that the plaintiff, his solicitor or agent, may be at liberty to inspect and peruse the documents so produced, and to take copies thereof, and abstracts or extracts therefrom, as he shall be advised, at his own expense. This does not enable the plaintiff to authorize anybody, other than his solicitor or *bonâ fide* agent, to peruse the documents.²

The production of documents has been hitherto considered with respect to an application by the plaintiff as against the defendant, and until recently it was not competent to the defendant, except under very peculiar and exceptional circumstances, to obtain an order for the plaintiff to produce documents in his possession before the hearing of a cause, unless by means of a cross bill.³ Now,

¹ Woodroffe v. Daniel, 10 Sim. 126.

² Bartley v. Bartley, 1 Drew, 233; Summerfield v. Prichard, 17 Beav. 9. A person who obtains an order for the production of documents is entitled not only to inspect them himself, but to have them inspected by his solicitors and agents. But neither he nor they are entitled to make public the information they obtain by means of such inspection; an injunction will be granted, if necessary, to prevent it. Williams v. Prince of Wales Life &c. Co. 23 Beav. 338.

³ Where the books or documents of the plaintiff are material for the defendant's defence of the suit, the defendant must file a cross-bill against the plaintiff for a discovery of them. Kelly v. Eckford, 5 Paige, 548.

In ordinary cases the plaintiff cannot be compelled, upon motion, to submit his books or other documentary evidence in his possession to the inspection of the defendant, to enable the latter to answer the bill and make his defence in the suit. But if the plaintiff, on request, refuses to permit the defendant to inspect such books or documents, he cannot afterwards object that the answer is insufficient in not stating their contents. Kelly v. Eckford, 5 Paige, 548. See Jennings v. Smith, 3 John. Ch. 409.

But in cases of partnership, where the partnership books and papers are in the hands of one of the copartners, or of his assignees or representatives, upon the ap-

however, by the 20th section of 15 & 16 Vict. c. 86, it is enacted, that "It shall be lawful for the Court, upon the application of any defendant in any suit, whether commenced by bill or claim, but as to suits commenced by bill, where the defendant is required to answer the plaintiff's bill, not until he has put in a full and sufficient answer to the bill, unless the Court shall make any order to the contrary, or make an order for the production by the plaintiff in such suit, on oath, of such of the documents in his possession or power, relating to the matters in question in the suit as the Court shall think right, and the Court may deal with such documents, when produced, in such manner as shall appear just."¹

It will be observed, that this order cannot be obtained by the defendant until he has answered the bill, so that he is not enabled to obtain an inspection of documents, for the purpose of enabling him to discover how to frame his defence. The practice appears to be the same with respect to the plaintiff as before set forth with respect to a defendant. The plaintiff will have to make an affidavit, similar in form to that to be made by a defendant;² after the affidavit is made, the same objection to particular documents may be made.

No affidavit, however, on the part of the defendant is necessary to support the application, nor does delay in applying deprive him of his right to an order.³ There will also be the same necessity on the part of the defendant to show an admission by the plaintiff of possession of the required documents.⁴

It will be recollected that, by the 19th section of the same Act, the defendant may, without filing a cross-bill, exhibit interrogatories for the examination of the plaintiff, to which shall be prefixed a concise statement of the subjects on which a discovery is required of the other party, in any stage of the suit, the party so having them in his possession, or under his control, will be compelled to deposit them in the hands of an officer of the Court, for the inspection of the party making such application, and that such party may take copies thereof, if necessary. *Kelly v. Eckford*, 5 Paige, 548.

¹ This section does not enable the defendant to obtain an order for the production of documents in the possession of a co-defendant. *Attorney-General v. Clapham*, 10 Hare, App. 68; *Barbridge v. Robinson*, 2 Mac. & G. 244.

² Ante, p. 1374; and see *Attorney-General v. Clapham*, 10 Hare, App. 68; *Fiott v. Mullens*, 16 Jur. 946; *Rochdale Canal Company v. King*, 15 Beav. 11.

³ *Rochdale Canal Company v. King*, 15 Beav. 11.

⁴ As to what constitutes a sufficient admission, see *Lamb v. Orton*, 1 Drew, 414; *Wing v. Harvey*, 10 Hare, App. 68; *Reynell v. Sprye*, 1 De Gex, M. & G. 656.

sought. The defendant cannot, under this section, file interrogatories for the examination of the plaintiff until he has put in a sufficient answer, if one is demanded from him.

These interrogatories are prepared and filed precisely in the same manner as interrogatories for the examination of a defendant on behalf of the plaintiff. So also the answer to the interrogatories is regulated by the same practice as the answer of a defendant, and if further time be required it is obtained in a similar manner.

SECTION IV.

Application for the Appointment of Guardians and Orders for Maintenance.

As a general rule, none of the powers or remedies appertaining to the original jurisdiction of the Court of Chancery can be called into operation until a bill has been regularly filed and a suit duly instituted. Exceptions, however, to this rule have now, in some instances, been established. In very many cases special powers have been conferred upon the Court by Acts of Parliament, and the statutes usually direct that the jurisdiction they create shall be exercised in a summary manner upon petition.¹ But there is one instance of a portion of the original jurisdiction of Chancery being exercised upon petition without suit, and by the recent changes in practice this jurisdiction is now exercised by a Judge in chambers. This exception to the general rule occurs where a guardian to the person, or estate of an infant is appointed, or an order for maintenance out of his property is made in a summary manner upon petition. The power of appointing guardians and making orders for maintenance, constitutes a part of that general and important jurisdiction which the Court of Chancery exerts for the protection of the property of infants and the safe custody of their persons during their minorities.²

¹ It may be observed that, in such cases, ordinary jurisdiction by bill is not excluded except by express enactment (*Hyde v. Edward*, 12 Beav. 160), though the party refusing to avail himself of the summary jurisdiction may have to pay the costs. *Thomas v. Walker*, 18 Beav. 521.

² For the origin and history of this jurisdiction, see Co. Litt. 89 a, note 16; 2 Fonb. Tr. Eq. note, p. 226, 5th edit. F. N. B. 232; *Wellesley v. The Duke of*

When it is desirable that the estate of the infant should be managed by the Court, or that special directions should be given concerning his education, maintenance or custody, a suit must be regularly instituted; in which case, immediately upon the bill being filed, the infant becomes a ward of Court, and thereupon any person wrongfully interfering either with his property or person, may be punished as guilty of a contempt of Court.¹

In order that the benefit arising from the protection of the Court may be extended to all cases in which interference is desirable, it is permitted to any person to commence proceedings on behalf of infants, subject, however, to the risk of incurring the censure of the Court, and of being compelled to pay the costs of the suit in the event of its subsequently appearing that the proceedings were improperly instituted.²

So far as the jurisdiction of the Court relates to the appointment of guardians and the protection of the persons of infants, it does not seem absolutely necessary to allege as a foundation for the interference of the Court, that the infant is possessed of property; but, with the exception of appointing a guardian for the purpose of consenting to a marriage, there can scarcely occur a case where the Court can be called upon to interfere unless the infant is possessed of some property. According to Lord Eldon in *Wellesley v. The Duke of Beaufort*,³ "The Court is not in the habit of exercising jurisdiction over the persons of infants except in cases where the existence of property has brought them within the power of the Court; but it is not from any want of jurisdiction that it does not act, but from a want of means to exercise its jurisdiction, because the Court cannot take upon itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically only where it has the means of doing so, that is to say, by its having the means of applying property for the use and maintenance of the infants."

Beaufort, 2 Russ. 20; 2 Story Eq. Jur. § 1327 *et seq.*; 2 Kent (10th ed.) 244, Lec. 30.

¹ *Batley v. Freeman*, Amb. 302, and notes there quoted; see also the case of *Hughes v. Science*, Macpherson on Infants, p. 581; S. C. cited in Blunt's *Ambler*, 302, note (2); 2 Story Eq. Jur. § 1353.

² *Starten v. Bartholomew*, 6 Beav. 143; *Sale v. Sale*, 1 Beav. 586; *Fox v. Sowererop*, 1 Beav. 583; *Raven v. Kere*, 2 Phil. 692.

³ 2 Russ. 20; *Beattie v. Johnson*, 1 Phil. 30; *Re Spence*, 2 Phil. 252; *Re Fynn*, 2 De G. & Sm. 481.

The cases, however, in which an infant and his property are placed under the protection of the Court in the course of a suit regularly instituted, present no peculiarities to require a detailed explanation in this place; but a summary jurisdiction has arisen under which the Courts of Equity are enabled to afford to infants and their property a certain limited amount of protection upon a summary application in chambers, and it is to this jurisdiction, and to the procedure connected with it, that the present chapter will be devoted.

The exercise of this summary jurisdiction on the part of the Court is limited to the grant of two different kinds of relief: —

First, The appointment of some person to have the custody of the person and estate of an infant, and the care of his education during minority.

Secondly, The grant of some provision for the maintenance of an infant out of his property when no sufficient fund is otherwise available for that purpose.

It is usual for both of these forms of relief to be granted upon the same application, but it will be more convenient first to consider the circumstances under which an order for the appointment of a guardian alone may be obtained.

It is stated that the earliest case upon record of the exercise by the Court of Chancery of this power of appointing a guardian upon petition without suit, "occurred in the year 1696, in the case of Hampden."¹ It appears, however, upon reference to the Registrar's books, that cases of a similar kind occurred at an earlier period.²

Where the only object is the appointment of the guardian of the person, there does not seem to be any limit to the jurisdiction of the Court arising from the size of the estate of the infant. In such a case, however large the property may be, the proper course seems to be to apply in chambers, and there is no necessity for filing a bill.³ The fact of a father of an infant being alive, is not in itself a sufficient reason to prevent the Court interfering; but if a sufficiently strong case is made, a person will be appointed, without suit, to act as guardian during the lifetime of the father. In *Ex parte Mountfort*, Lord Eldon said, "I have no doubt, that in certain cases the Court will, upon petition, without a bill, appoint, not a guardian, which cannot be during the father's life, but

¹ Co. Litt. 89 a, n. 16.

² *Ex relatione*, Mr. Monro.

³ *Ex parte Mountfort*, 15 Ves. 447, n.

a person to act as guardian, though in modern times the Court has professed to be very cautious upon that.”¹

By statute 12 Car. II. c. 24, it was enacted, “That where any person hath or shall have any child or children under the age of twenty-one years, and not married at the time of his death, it shall and may be lawful to and for the father of such child, whether born at the time of the decease of the father, or at that time *en ventre sa mère*, or whether such father be within the age of twenty-one years, or of full age, by deed² executed in his lifetime, or by his last will and testament in writing,³ in the presence of two or more credible witnesses, in such manner and from time to time as

¹ The case of *Wellesley v. The Duke of Beaufort*, 2 Russ. 1, was upon a petition in a cause, but may be referred to for the principles upon which the Court appoints a person to act as guardian during the lifetime of the father; *Re Fynn*, 2 De G. & Sm. 457; *Thomas v. Roberts*, 3 De G. & Sm. 758. Whenever a father is guilty of gross ill-treatment or cruelty towards his infant children, or is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or he professes atheistical or irreligious principles; or his domestic associations are such as tend to the corruption and contamination of his children; or he otherwise acts in a manner injurious to the morals or interests of his children; in every such case the Court of Chancery will interfere and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them, and to superintend their education. 2 Story Eq. Jur. § 1341; *Powel v. Cleaver*, 2 Bro. C. C. (Perkins's ed.) 500, 501, and notes and cases cited; 1 Macpherson, *Infants*, (Lond. ed. 1841,) 142, 147. The English cases on this subject are numerous. See some of them cited 2 Story Eq. Jur. § 1341, in note; *De Manneville v. De Manneville*, 10 Sumner's Vesey, 52, and notes. See, also, *ex parte Wollstonecraft*, 4 John. Ch. 80; *Ex parte Waldron*, 13 John. 419; *People v. Mercien*, 8 Paige, 47; *U. States v. Green*, 3 Mason, 482; *In re Mitchell*, R. M. Charl. 489, 494, 495; 2 Kent (10th ed.) 245, 246, and notes; *Ahrenfeldt v. Ahrenfeldt*, 1 Hoff. Ch. R. 497.

² In some of the United States it is expressly provided by statute that the father may by deed, executed in his lifetime, dispose of the custody and tuition of his children during their minority. 2 Kent (10th ed.) 250, note.

³ In Massachusetts, “a father may by his last will in writing appoint guardians for his children, whether born at the time of making the will or afterwards, to continue during the minority of the child, or a less time.” Genl. Sts. c. 109, s. 5. The will, in such case, must be executed with the formalities required by the general law respecting the execution of wills. *Wardwell*, appt., decided, Essex Co. Mass., Jan. T. 1865. This power of a father to constitute a guardian by will has been pretty extensively adopted in this country. It is a personal trust, and not assignable. 2 Kent (10th ed.) 249, 250; *Eyre v. Shaftesbury*, 2 P. Wms. 121; *Balch v. Smith*, 12 N. Hamp. 441. A will merely appointing a testamentary guardian need not be proved. 2 Kent (10th ed.) 250. See *Peyton v. Smith*, 2 Dev. & Bat. Eq. 325; *M'Allister v. Olmstead*, 1 Humph. 210.

he shall respectively think fit, to dispose of the custody and tuition of such child or children, for and during such time as he or they shall respectively remain under the age of twenty-one years, or any lesser time, to any person or persons in possession or remainder other than Popish Recusants, and that such disposition of the custody of such child or children shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardian in *socage* or otherwise. That such person or persons, to whom the custody of such child or children hath been or shall be so disposed or devised, shall and may take into his or their custody, to the use of such child or children, the profits of all lands, tenements and hereditaments of such child or children, and also the custody, tuition and management of the goods, chattels and personal estate of such child or children till their respective age of twenty-one years or any lesser time, according to such disposition as aforesaid, and may bring such action or actions in relation thereunto as by law a guardian in common *socage* might do."

It will be observed, that the effect of this statute was to enable any father, although within the age of twenty-one years, to dispose of the custody of any child that he might leave unmarried, and this power he might have exercised either by deed or will.

The 7th section of the recent Wills Act, 7 Will. IV. & 1 Vict. c. 26, has enacted, "That no will made by any person under the age of twenty-one years shall be valid." So that the power conferred by stat. 12 Car. II. c. 24, by which a father, under the age of twenty-one years, could have devised the custody of his children, is now abolished.¹ There does not, however, seem any reason why the power to dispose of the custody *by deed* should not still continue in a like case. The Act only enables the father to dispose of the custody of his unmarried children, but it seems that if a male child be unmarried at the time of the death of his father, the testamentary guardianship does not determine until he attains the age of twenty-one years notwithstanding his marriage.² In such a case, the guardianship of a female would necessarily determine by marriage.³

¹ In several of the United States, the father, though a minor, may appoint a testamentary guardian, who should have the powers of a guardian in common *socage*. 2 Kent (10th ed.) 250, note.

² Earl of Shaftesbury's Case, cited 3 Atk. 625. See 2 Kent (10th ed.) 252.

³ Mendes v. Mendes, 1 Ves. 91. The cases are not very clear and consistent

The Act confers authority upon no person except a father,¹ and with respect to a father, it has reference only to legitimate children. A testamentary guardian is subject to the control of the Court,² both with respect to the property and the person of the infant; and also with respect to the religion of the infant;³ and even during his lifetime, the Court has power to appoint another guardian in his stead.⁴ But, according to Lord Redesdale, in the case of *O'Keefe v. Carey*,⁵ "Where a testamentary guardian has once taken the trust upon him and acted as guardian, if it is sought to remove him for misconduct, a bill must be filed⁶; but not when he declined to act; for that is as if there had been no appointment of him as guardian." In such cases, a guardian should be appointed upon petition, and it may here be observed, that the mere circumstance of a dispute concerning the person to be appointed guardian is no reason why the application should not be made without suit.⁷

The application in all these cases, until the recent changes in practice, was by petition to the Court, and upon the hearing of the petition the Court usually referred the matter to one of the Masters.⁸ Now the application is by summons, entitled in the matter of the infant, and prosecuted in chambers, according to the practice concerning matters originating in chambers. The same extent of jurisdiction will probably be exerted in chambers without on this point. See 2 Kent (10th ed.) 251, 252; *Roach v. Garvan*, 1 Ves. sen. 160; *In re Whitaker*, 4 John. Ch. 380; *Jones v. Ward*, 10 Yerger, 160; *Goodall v. Harris*, 2 P. Wms. 560; *Nicholson v. Wilborn*, 13 Geo. 467. By statute in Massachusetts, the marriage of a female, under guardianship as a minor, shall discharge her guardian from all right to her custody and education, but not to her property. Genl. Sts. c. 109, s. 26.

¹ *Brigham v. Wheeler*, 8 Metcalf, 127.

² *Duke of Beaufort v. Berty*, 1 P. W. 705; *Foster v. Denny*, 2 Ch. Ca. 237; *Morgan v. Dillon*, 9 Mod. 141.

³ *Talbot v. Earl of Shrewsbury*, 4 M. & C. 673; *Witty v. Marshall*, 1 Y. & C. 68.

⁴ In Massachusetts, when a guardian, appointed either by a testator or by the Probate Court, becomes insane, or otherwise incapable of discharging his trust, or evidently unsuitable therefor, the Court, after notice to him and all others interested, may remove him, and appoint another in his stead. Genl. Sts. c. 109, s. 24.

⁵ 1 Sch. & Lef. 106.

⁶ A testamentary guardian is not usually removed by the Court. *Roach v. Gardner*, 1 Ves. 150; *Beattie v. Johnstone*, 1 Ph. 31.

⁷ *Eyre v. Countess of Shaftesbury*, 2 P. W. 123; *Ex parte Earl of Ilchester*, 7 Ves. 348; *In re Maculloch*, 3 Jones & Lat. 276.

⁸ See 2 Kent (10th ed.) 254.

suit, as heretofore has been exerted upon petition without suit. The summons must be served on all persons who have any interest in the fund, out of which the maintenance is sought to be provided. Evidence by affidavit in support of the application must be given to prove the proposed guardian is a fit and proper person, possessing no interest opposed to that of the infant. Evidence must also be given of the extent and nature of the whole of the infant's property and of the age of the infant, and any material particulars concerning his parents or relatives.

Orders are, however, not unfrequently made in suits, but it is not now necessary in these orders to direct the inquiries, which can be made in chambers without express reference.¹

If the mother of the infant, or any other female, be appointed guardian, and marry after her appointment, her guardianship determines, and it is of course, to approve of a guardian in her place.² So, also, where one of several guardians appointed by the Court dies, the right of the survivors determines, and it becomes necessary to apply again to make a new appointment.³ In the case, however, of testamentary guardians, it does not appear that the office is terminated upon the death of one; but even though there be no words of survivorship in the deed or will, appointing the guardian, the office will, upon the death of one, extend to the survivors.⁴

The appointment of a guardian by the Court seems to confer upon the person appointed exclusive right to the custody of the

¹ Seton on Decrees, 344.

² *In re* Gornall, 1 Beav. 347. This is the law by statute in Massachusetts. Genl. Sts. c. 109, s. 25.

³ *Hall v. Jones*, 2 Sim. 41. The rights and authority of guardians over the person and property of their wards, are, like the rights and authority of executors and administrators, strictly local, and cannot be exercised in other States. *Morrell v. Dickey*, 1 John. Ch. 156; *Sabin v. Gilman*, 1 N. Hamp. 193; *Armstrong v. Lear*, 12 Wheat. 169; *Story Conf. Laws*, § 499, 594. Where a guardian removed from a State in which he received his appointment, carrying with him a part of the infant's property, the Court, without notice to him, appointed another in his place. *Cooke v. Beale*, 11 Ired. 36; *Loskey v. Reid*, 4 Bradf. (N. Y.) 334.

In Massachusetts, when a person under guardianship removes out of the State, his guardian may pay over and transfer the whole or any part of his property to any guardian or trustee appointed by competent authority, in the State to which the residence of the ward is removed, upon such terms and in such manner as the Supreme Court shall decree. Genl. Sts. c. 109, s. 23.

⁴ P. Wms. 107, 108, 133.

person of the infant.¹ The Court of Chancery has jurisdiction over the custody of the children of English subjects, even though born and resident abroad.²

The following is an ordinary form of order used on the appointment of a guardian of the person and estate: — "Upon A. B. first giving security, to be approved of by the Judge, to whose Court this cause or matter is attached, duly to account for and pay what he shall receive of the said C. D., the infant's fortune, as this Court shall direct, let the said A. B. be appointed guardian of the person and estate of the said C. D., the infant, during his minority, or until the further order of the Court."³

The testamentary guardian seems to possess as an incident to his office the power of making valid leases of the estate of the infant for the term of his guardianship, upon which ejectment can be maintained; but a lease made by such a guardian to last beyond the minority of the ward is absolutely void after the infant comes of age.⁴

Although, however, the testamentary guardian possesses these legal rights over the estate of the infant, he is, in all respects, subject to the control of the Court, and liable to account for what he receives.⁵ His rights and liabilities seem to be nearly the same as those of the guardian in *socage*, except that they continue until the infant is twenty-one, instead of terminating, as in the case of the guardian in *socage*, at fourteen.⁶ According to Lord Hard-

¹ See *In re Dawson*, 3 De G., Mac. & Gor., as to a guardian taking an infant out of the jurisdiction of the Court.

² *Hope v. Hope*, 4 De G., Mac. & Gor. 328.

³ The general jurisdiction over every guardian, however appointed, still resides in Chancery; and a guardian appointed by the Surrogate, or by will, is as much under the superintendence of the Court of Chancery, and of the power of removal by it, as if he were appointed by the Court. *In re Andrews*, 1 John. Ch. 99; *Ex parte Crumb*, 2 John. Ch. 439; *Duke of Beaufort v. Berty*, 1 P. Wms. 703; 2 Kent (10th ed.) 253, 254, and note; *Wilcox v. Wilcox*, 4 Kernan (14 N. Y.) 575.

⁴ *Roe d. Parry v. Hodgson*, 2 Wils. 135.

⁵ 2 Kent (10th ed.) 253; *In re Andrews*, 1 John. Ch. 99; *Ex parte Crumb*, 2 John. Ch. 439; 2 Story Eq. Jur. § 1344; 1 Smith Ch. Pr. (2d Am. ed.) 653, note (a); Genl. Sts. of Mass. c. 109, s. 6.

⁶ It is remarked by Chancellor Kent, (2 Kent Comm., 10th ed., 252,) "The distinction of guardians, by nature and by *socage*, seems now to be lost or gone into oblivion, and those several kinds of guardians have become essentially superseded in practice by the *Chancery Guardians*, or guardians appointed by the Court of Chancery, or by the Surrogates in the respective counties of New York, and by

wicke, "It is at the peril of a guardian in *socage*, what he applies for maintenance, and he will be allowed according to the discretion he has used."¹

From what has been stated concerning the power of a guardian appointed by the Court, over the estate, it may be inferred, that he has no power incident to his office of making a lease valid at law of any portion of the infant's estate; nor is there any authority as to the circumstances under which a lease made by such a guardian during the minority would be supported in equity.² Consequently, when a suit is instituted, it is usual for a Receiver to be appointed,³ but it has been held, there is no jurisdiction to appoint a Receiver, except on a bill filed.⁴ Several instances, however, have occurred in modern times, when the same person has been appointed Guardian and Receiver.⁵ The Court, however, cannot, under its original jurisdiction, in such a case, enable a Receiver to create any legal term in the land, nor could it in any manner insure the occupation of the tenant beyond the period of the infant's minority. For the purpose, therefore, both of preventing the necessity of instituting a suit wherever a lease even for a short duration of an infant's estate was necessary, and also for the purpose of enabling the Court to make valid leases to last beyond the period of the minority of the infant,⁶ it has been enacted by

Courts of a similar character, and having jurisdiction of testamentary matters, in the other States of the Union. Testamentary guardians are not very common, and all other guardians are now appointed by the one or the other of those jurisdictions." See *Putnam v. Ritchie*, 6 Paige, 390; *Wilson v. Roach*, 4 Cal. 362.

¹ *Ex parte Whitfield*, 2 Atk. 315.

² The guardian of the estate has no further power over, or concern with, the real estate than that which relates to the leasing of it, and the reception of the rents and profits, and it is his duty to place the ward's land upon lease. 2 Kent (10th ed.) 255; *Genett v. Tallmadge*, 1 John. Ch. 561; *Jones v. Ward*, 10 Yerger, 160. He may lease during the minority of the ward and no longer. *Field v. Schieffelin*, 7 John. Ch. 154; *Snook v. Sutton*, 5 Halsted, 133; *Putnam v. Ritchie*, 6 Paige, 391. He may sell the personal estate without the previous order of the Court. *Field v. Schieffelin*, 7 John. Ch. 150; *Ellis v. Essex M. Bridge*, 2 Pick. 243; *Bank of Virginia v. Craig*, 6 Leigh, 399; *Hunter v. Lawrence*, 11 Grattan, 111; *Woodward v. Donally*, 27 Ala. 198. But the safer course for the guardian is, to have such previous order. 2 Kent (10th ed.) 255, note. And in Massachusetts provision is made by statute for obtaining it. Genl. Sts. c. 109, s. 22.

³ Post, p. 1406.

⁴ *Ex parte Whitfield*, 2 Atk. 315.

⁵ See Seton on Decrees, p. 352.

⁶ *Ex parte Leigh*, 15 Sim. 445.

statute 1 Will. IV. c. 65, s. 17, "That where any person, being an infant under the age of twenty-one years, is or shall be seised or possessed of or entitled to any land in fee or in tail, or to any leasehold land for an absolute interest, and it shall appear to the Court of Chancery to be for the benefit of such person, that a lease or underlease should be made of such estates for terms of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or the working of mines or otherwise improving the same, or for farming or other purposes, it shall be lawful for such infant, or his guardian in the name of such infant, by the direction of the Court of Chancery, to be signified by an order to be made in a summary way upon the petition of such infant or his guardian, to make such lease of the lands of such person respectively, or any part thereof according to his or her interest therein respectively, and to the nature of the tenure of such estates respectively, for such term or terms of years, and subject to such rents and covenants as the said Court of Chancery shall direct; but in no such case shall any fine or premium be taken, and in every such case the best rent that can be obtained, regard being had to the nature of the lease, shall be reserved upon such lease."¹

The 12th section of the same Act confers a similar jurisdiction upon the Court to make order in a summary way, upon the petition of the guardians, for the surrender of leases belonging to the infants,² and for the acceptance in place thereof of renewed leases.

In general, in order to give the Court jurisdiction, it was deemed necessary that a petition presented for the appointment of a guardian should allege that the infant has some property or estate to be protected;³ but to this rule there is an exception in the case of a petition under the provisions of the Marriage Act, 4 Geo. IV. c. 76, which enables a guardian to be appointed, to give consent to

¹ Cases under this section occurred in *Harris v. Davis*, Jurist, Vol. 9, 1084; *In re Griffin*, V. C. of England, 28th April, 1843, and 17th February, 1844; *In re Aldridge*, M. R., 13th November, 1835; S. C. 12th February, 1836; *Milward v. Milward*, 1st March, 1836; and S. C. 24th May, 1836; *Hill v. Hill*, 24th June, 1836; *Frank v. Frank*, 11th May, 1836; *Ex parte Earl of Darnley*, 23d March, 1836; *Ex parte Brystock*, 11th May, 1837; *Cook v. Cook*, 9th June, 1840.

² See *Putnam v. Ritchie*, 6 Paige, 391.

³ See *supra*, p. 1393. See, however, *In re Spence*, 2 Ph. 247; *In re Fynn*, 2 De G. & Sm. 481.

the marriage of an infant. By the 16th section of the statute, it is enacted, "That the father, if living, of any party under twenty-one years of age, such parties not being a widower or widow; or if the father shall be dead, the guardian or guardians of the party so under age, lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then the mother of such party, if unmarried, and if there shall be no mother unmarried, then the guardian or guardians of the person appointed by the Court of Chancery (if any), or one of them, shall have authority to give consent to the marriage of such party; and such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorized to give such consent." ¹

By the 17th section of the same Act, it is enacted, that in case the father or fathers of the parties to be married, or one of them, so under age, as aforesaid, shall be *non compos mentis*, or the guardian or guardians, mother or mothers, or any of them whose consent is made necessary as aforesaid to the marriage of such party or parties, shall be *non compos mentis*, or in parts beyond the seas, or shall unreasonably, or from undue motives, refuse or withhold his, her or their consent, to a proper marriage, then it shall and may be lawful for any person desirous of marrying, in any of the before-mentioned cases, to apply by petition to the Lord Chancellor, Lord Keeper, or the Lords Commissioners of the Great Seal of Great Britain for the time being, Master of the Rolls, or the Chancellor of England, who is and are respectively hereby empowered to proceed upon such petition in a summary way; and in case the marriage proposed shall, upon examination, appear to be proper, the said Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal for the time being, Master of the Rolls, or Vice-Chancellor, shall judicially declare the same to be so, and such judicial declaration shall be deemed and taken to be as good and effectual to all intents and purposes, as if the father, guardian or guardians, or mother of the person so petitioning, had consented to such marriage.

Upon the words of this section, Lord Cottenham decided,² that there is no jurisdiction in the Court to sanction a marriage where

¹ *Ex parte* Becher, 1 Bro. C. C. 556; In the Matter of Woolcombe, 1 Mad. 213.

² *Ex parte* I. C., 3 M. C. 471.

the father, not being of unsound mind, unreasonably or without due motives, withholds his consent.¹

For the purpose of providing for the maintenance of infants out of their property during minority, it is customary to insert in settlements express powers, authorizing the legal holders of the funds to apply either the whole or some portion of the income or capital for the maintenance and advancement of the infant, according to such conditions as may be considered convenient. In the absence of any such powers, in the event of the father being dead, or unable to support the infant, the guardian may apply the income of the infant's estate towards his maintenance; and such payments (if clearly necessary) would be allowed the guardian in passing his accounts.

But in such a case, the trustee or guardian acts upon his own responsibility, and it is therefore usual, when there is a necessity for an application of a portion of the infant's property towards his support, and no power to authorize it, for the Court, upon the petition of the infant, to make an order for his maintenance.

This practice of ordering maintenance without a bill filed, though now for several years completely established, has been considered to be confined to cases where the income of the infant was small. In other cases it has been deemed necessary that a bill should be filed. No clear rule, as to the amount which renders a bill necessary, can be laid down; but the more recent cases show a relaxation in the practice, and a tendency to abolish any distinction that has existed between the cases where the income of the infant has been derived from real estate, and where it has been derived from personalty.

Thus, where the income of an infant was derived from personal estate, and exceeded 1,500*l.* a year, Sir L. Shadwell said, that he thought the distinction as to making orders on petitions, without suit, between cases where the income was above or below 300*l.* per annum, was without any foundation in principle, and he made the order.² So, also, in a case where the income of the infant was derived from the rents of a freehold estate of the value of 260*l.* per annum, the same Judge said that Lord Eldon had, during the

¹ *Ex parte Reily*, Jurist, Vol. 7, 589.

² *In re Christie*, 9 Sim. 643.

latter part of his judicial life, refused to make an order for a reference as to maintenance out of an infant's freehold estate, without suit, but that he could never discover the reason for such refusal, as the order discharged the party making the payment to the extent only of the allowance made, and his Honor directed a reference according to the prayer of the petition.¹

As a general rule the Court will not, during the lifetime of the father, order maintenance for his children out of their property, as it is his duty to support them.² When, however, it appears that the father is not of sufficient ability to educate them according to their estate, an allowance will be granted by the Court for that purpose.³

Another exception to the general rule, rendering it incumbent upon a father to maintain his children exclusively out of his own property, occurs where the father has entered into a contract, part of the consideration for which is, that certain property should be applied to the support of his children; thus in *Meacher v. Young*,⁴ a proviso that the issue of the marriage should have maintenance out of the trust fund, formed an integral part of the contract, and

¹ *Ex parte Starkie*, 3 Sim. 339; and see *Ex parte Angell*, 13 Sim. 258; *Nunn v. Harvey*, 2 De G. & Sm. 301; see *Matter of Bostwick*, 4 John. Ch. 102.

² 2 Story Eq. Jur. § 1354 *a*; 1 Smith Ch. Pr. (2d Am. ed.) 654, 655, note (*a*).

³ In Massachusetts, if a minor, who has a father living, has property sufficient for his maintenance and education in a manner more expensive than the father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the maintenance and education of such child may be defrayed out of his own property in whole or in part, as shall be deemed reasonable by the Probate Court. Genl. Sts. c. 109, s. 21. See *Whipple v. Dow*, 2 Mass. 415; *Dawes v. Howard*, 4 Mass. 97; *Wilkes v. Rogers*, 6 John. 566. See further, as to this subject of maintenance of infants, *Greenwell v. Greenwell*, 5 Sumner's Vesey, 199, notes (*a*) and (*b*); 1 Macpherson, *Infants*, (London ed. 1841,) 219 *et seq.*; *Matter of Davison*, 6 Paige, 136. It was held in *Myers v. Myers*, 2 M'Cord Ch. 255, that, if the father is in indigent circumstances, and the children are wealthy, the Court will allow for maintenance; otherwise the parent must support his children. See, also, to the same effect, *Chapline v. Moore*, 7 Monroe, 173. See further, *Dupont v. Johnson*, 1 Bailey Eq. 279; *Cudworth v. Thompson*, 3 Desaus. 258; *Ambler v. Macon*, 4 Call, 606. As to allowing maintenance for past time, see *Andrews v. Partington*, 3 Bro. C. C. (Perkins's ed.) 60, note (*a*) and cases cited; *Matter of Bostwick*, 4 John. Ch. 104; *Wilkes v. Rogers*, 6 John. 566; *Greenwell v. Greenwell*, 5 Sumner's Vesey, 199, and note (*b*).

⁴ 2 M. & K. 490; *Stocken v. Stocken*, 4 M. & C. 95; *Munday v. Earl Howe*, 4 Bro. C. C. 224; *Ex parte Hays*, 3 De G. & Sm. 485.

even one of the considerations which had moved the husband to join as a party in the settlement. Under these circumstances it was held, that he had a right to have the contract strictly executed in his own favor, without reference to the question of ability.

It may be here mentioned, that when the infant and his father were resident abroad, the Court made an order, enabling the father to appoint an attorney to receive the sum allowed for maintenance, upon the production to the Accountant-General of an affidavit that he had duly applied, in the maintenance and education of the infant, all moneys received by him on that account.¹

In cases where stock is standing, not in the names of trustees for the benefit of the infant, but in the name of the infant himself, a statutory jurisdiction has been conferred upon the Court, for the purposes of enabling orders to be made directing the payment of the dividends.

By stat. 1 Will. IV. c. 65, s. 32, "The Court of Chancery may, by an order to be made on the petition of the guardian of an infant, in whose name any stock shall be standing, or any sum of money, by virtue of any Act for paying off any stock, and who shall be beneficially entitled thereto; or if there shall be no guardian, by an order to be made in any cause depending in the said Court, direct all or any part of the dividends due or to become due in respect of such stocks or any such sum of money, to be paid to any guardian of such infant, or to any other person, according to the discretion of such Court, for the maintenance and education, or otherwise for the benefit of such infant, such guardian or other person to whom such payment shall be directed to be made being named in the order directing such payment; and the receipt of such guardian or other person, for such dividends or sum of money, or any part thereof, shall be as effectual as if such infant had attained the age of twenty-one years, and had signed and given the same."

It may be mentioned in connection with this subject that by the 2 & 3 Vict. c. 54, intituled, "An Act to amend the Law relating to the custody of Infants," the Court of Chancery is enabled, upon the petition of the mother of any infant, to make an order for the access of the petitioner to her infant children at such times and under such regulations as the Court shall deem convenient and just; and if such children shall be within the age of seven years,

¹ De Weever v. Rochport, 6 Beav. 391, and cases there quoted.

the Court may order them to be delivered into the custody of the petitioner until such age. Applications under this Act may be made to the Master of the Rolls, or to any of the Vice-Chancellors.¹ Orders made under the Act may be enforced by the usual process of contempt. A mother who has been guilty of adultery cannot apply.² The mother has no strict right in cases of this kind, but the Court exercises its discretion upon the whole case as presented, it hearing the affidavits on both sides. The Act does not, however, enable the mother to resist the strict legal right of the husband to the custody of the children in cases³ where he is entitled to it.⁴

CHAPTER XXVIII.

OF RECEIVERS.

SECTION I. — *In what Cases Appointed.*

A RECEIVER is an indifferent person between the parties, appointed by the Court to receive the rents, issues, and profits of lands or other thing, in question in this Court, pending the suit, where it does not seem reasonable to the Court that either party should do it,⁵ or where a party is incompetent to do so, as in the case of an infant. He is to account for such receipt when the Court shall require him, and, to secure his doing so, he is commonly ordered to enter into a recognizance, with sureties.⁶

The appointment of a Receiver is a matter resting in the discretion of the Court,⁷ and the Receiver, when appointed, is treated

¹ *In re Taylor*, 10 Sim. 271.

² Sect. 4.

³ See also *Warde v. Warde*, 2 Ph. 786; *Re Fynn*, 2 De G. & Sm. 457; *Norman v. Roberts*, 3 De G. & Sm. 714; *Re Tomlinson*, 3 De G. & Sm. 371.

⁴ *Costellis v. Costellis*, Dr. & W. 235.

⁵ *Edwards, Receivers*, 2; *H. K. Chase's Case*, 1 Bland, 213.

⁶ *Prac. Reg.* 355, 356; 2 Harr. (ed. Newl.) 499.

⁷ *Skip v. Harwood*, 3 Atk. 564; *Nichols v. Perry Patent Arm Co.*, 3 Stockt. (N. J.) 126; *Oakley v. Patterson Bank*, 1 Green Ch. 173; *Rawnsley v. Trenton Mut. Ins. Co.*, 1 Stockt. (N. J.) 347; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183. See *Verplank v. Caines*, 1 John. Ch. 57. In *Orphan Asylum v. McCartee*, 1 Hopk. 435, the Court remark, "It is said, that the appointing of a receiver rests in dis-

as virtually an officer and representative of the Court, and subject to its orders.¹

The most ordinary cases in which Receivers are granted by the Court, are those in which the suit arises out of claims by parties having equitable interests in the subject; in such cases the Court will appoint a Receiver, for the purpose of protecting the property till the question between the parties shall have been determined.² And, in general, it may be taken as a rule, that where the legal estate is vested in an individual claiming an interest paramount to that of the litigant parties, so that the litigant parties can only have an equitable interest, the Court will grant a Receiver, although, in doing so, it will always take care not to interfere with the rights of the party having the prior estate: therefore where a man has an equitable mortgage, "that is, if there is a prior mortgagee, then, if the prior mortgagee is not in possession, the other may have a Receiver, without prejudice to his taking possession."³ In *Berney v. Sewell*,⁴ Lord Eldon says, "I remember a case, where it was much discussed, whether the Court would appoint a Re-

cretion. This proposition does not teach much. A receiver is proper if the fund is in danger; and this principle reconciles the cases found in the books. There is no case in which the Court appoints a receiver, merely because the measure can do no harm." See *Parkhurst v. Kinsman*, 2 Blatch. C. C. 78.

As a general thing, under the law in New Jersey, where a corporation is legally declared insolvent, receivers will be appointed. *Nichols v. Perry Patent Arm Co.*, 3 Stockt. (N. J.) 126.

¹ *Angel v. Smith*, 9 Ves. 338; *Hutchinson v. Massarene*, 2 B. & B. 55; *Jeremy on Eq. Jur.* 248, 249; *Tillinghast v. Champlin*, 4 Rhode Is. 173; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183; *In re Colvin*, 3 Maryland Ch. Decis. 278. See *Williamson v. Wilson*, 1 Bland, 421; *Field v. Jones*, 11 Georgia, 413. He is at all times entitled to, and must receive, the advice and protection of the Court. *Cammack v. Johnson*, 1 Green Ch. 173. See *Matter of Receivers of the Globe Ins. Co.*, 6 Paige, 102; *Hooper v. Winston*, 24 Ill. 353.

² The appointment of a receiver alters no right, not even so as to prevent the running of the statute of limitations. *Williamson v. Wilson*, 1 Bland, 421. But though the appointment of a receiver does not involve a decision upon any right, still it can only be made at the instance of a party who has an acknowledged interest or a strong presumption of title, in himself alone, or in common with others; and where the property itself, or its rents and profits, are in danger of being materially injured, or totally lost. *H. K. Chase's Case*, 1 Bland, 213; *Williamson v. Wilson*, ib. 421. To authorize the appointment of a receiver in a suit in Chancery, the bill must lay a foundation for it, by stating the facts which show its necessity or propriety. *Tomlinson v. Ward*, 2 Conn. 396.

³ 1 J. & W. 648.

⁴ 1 J. & W. 649.

ceiver, where it appeared by the bill, that there was a prior mortgagee who was not in possession: I have a note of that case: there Lord Thurlow made the appointment, without prejudice to the first mortgagee taking possession, and that was afterwards followed by Lord Kenyon.”¹

The same principle is applied to other equitable creditors,² and indeed to all other persons having mere equitable estates. The rule, with respect to equitable creditors, is thus laid down by Lord Eldon, in *Davis v. The Duke of Marlborough*; ³ “The rule, I take to be, that the Court will, on motion, appoint a Receiver for an equitable creditor, or a person having an equitable estate, without prejudice to persons who have prior legal estates;—in this sense, without prejudice to persons having prior legal estates, that it will not prevent their proceeding to obtain possession, if they think proper; ⁴ and with regard to persons having prior equitable estates, the Court takes care, in appointing a Receiver, not to disturb prior equities; and, for that purpose, directs inquiries, to determine priorities among equitable incumbrancers, permitting legal creditors to act as against the estates at Law, and settling the priorities of equitable incumbrancers. Provided it is satisfied, in that stage of the cause, that the relief prayed by the bill will be given when the decree is pronounced, the Court will not expose parties claiming that relief to the danger of losing the rents, by

¹ See *Cortleyeu v. Hathaway*, 3 Stockt. (N. J.) 42, 43. In this case it was held, that the rights of a first and subsequent mortgagee are different. The first mortgagee has a legal right to the rents and profits, and has his remedy at law by ejectment. A subsequent mortgagee is better entitled to the remedy of a receiver, because he has no right to the possession at law as against his prior mortgagee, and if the first mortgagee refuses to exercise his legal rights, there seems a propriety in an interposition of a Court of Chancery.

The rule in New York, that where premises are an inadequate security, and the mortgagor is insolvent, a receiver will be appointed, has not been adopted by the Court of Chancery in New Jersey, no distinction being made between a first and a subsequent mortgagee, whose rights are entirely different. *Cortleyeu v. Hathaway*, *supra*. See *Warner v. Gouverneur*, 1 Barb. Sup. Ct. 38; *Bank of Ogdensburg v. Arnold*, 5 Paige, 39; *Shotwell v. Smith*, 3 Edw. Ch. 588; *Sea Ins. Co. v. Stebbins*, 8 Paige, 566.

² See *Curling v. Marquis Townshend*, 19 Ves. 628.

³ 2 Swanst. 108, 137.

⁴ See *Dalmer v. Dashwood*, 2 Cox, 382, but they must first obtain leave of the Court, *Bryan v. Cormick*, 1 Cox, 422; *Anon.*, 6 Ves. 287; *Angel v. Smith*, 9 Ves. 335; *Brooks v. Greathed*, 1 J. & W. 176; *Gresley v. Adderley*, 1 Swanst. 579, and see post. *Cortleyeu v. Hathaway*, 3 Stockt. (N. J.) 41.

not appointing a Receiver of an estate, on which it is admitted that they cannot enter.”¹ And here it may be remarked, that although, where there is a prior mortgagee in existence having the legal estate, the Court will not, by the appointment of a Receiver, deprive him of his right to possession, the Court will not permit him to object to the appointment of a Receiver by any act short of a personal assertion of his legal right, and taking possession himself.² And if, after a Receiver has been appointed, he does not think proper to avail himself of his legal right, (which he may do by applying to be examined *pro interesse suo*,) he will not be permitted to have the benefit of the Receiver,³—the appointment of a Receiver being for the benefit of incumbrancers, so far, only, as expressed to be for their benefit, and as they choose to avail themselves of it.⁴

It may be mentioned here, that the Court will grant a Receiver at the instance of a second incumbrancer, in all cases in which the first incumbrancer is not in possession of the property, and that the circumstance of the party creating the incumbrance being abroad, and refusing to appear to the suit, will not deprive the mortgagee of his right to possession.⁵ In *Holmes v. Bell*,⁶ however, Lord Langdale, M. R., appears to have entertained some doubt as to his power to appoint a Receiver, where one of two mortgagees, who were tenants in common, was abroad, at least so far as regarded the moiety of the absent party, although he thought the objection removed by the circumstance of the mortgagee, who was in England, being in the possession of the whole estate.

¹ The granting, however, of a receiver is a matter of discretion to be governed by the whole circumstances of the case, one of such circumstances being the probability of the plaintiff being ultimately entitled to a decree. *Owen v. Heman*, 3 Mac. & Gor. 378. Where, upon the application of a subsequent mortgagee, a receiver is appointed, it is without prejudice to any prior mortgagee or other incumbrancer, and the receiver will be directed to keep down the interest upon prior incumbrances. *Cortleyeu v. Hathaway*, 3 Stockt. (N. J.) 39. In this case the grounds are stated on which a receiver may be appointed on the application of a junior incumbrancer.

² *Silver v. The Bishop of Norwich*, 3 Swanst. 112, n., 115.

³ See *Anon.*, 6 Ves. 287; *Angel v. Smith*, 9 Ves. 336; *Brooks v. Greathed*, 1 J. & W. 178; *Hunt v. Priest*, 2 Dick. 540.

⁴ *Gresley v. Adderley*, 1 Swanst. 579.

⁵ *Tanfield v. Irvine*, 2 Russ. 149; also see and *quære* *Coward v. Chadwick*, ib. p. 150, n.

⁶ 2 Beav. 298; *Browne v. Blunt*, 2 R. & M. 83.

It may be mentioned, that a Receiver has been granted against a defendant who was out of the jurisdiction of the Court.¹ And a Receiver has also been appointed upon affidavit that the defendant had absconded to avoid service.²

But although the Court will, in general, grant a Receiver, at the instance of a party having an equitable estate, when the individual having a prior legal estate is not in possession, it will not, unless under very particular circumstances, appoint one where the party having the legal estate is in actual possession of the property.³ Thus, although a second mortgagee may have a Receiver, where the first is not in possession, yet if the first mortgagee is in actual possession of the estate, a Receiver will not be appointed, unless indeed it is shown that the first mortgagee has been paid off, in which case a Receiver may be appointed on the application of a subsequent incumbrancer.⁴

It is to be understood, that, in order to defeat an equitable mortgagee of his right to a Receiver, the possession of the party must be such a possession as invests him with a title to receive the rents and profits; a mere possession as tenant will not be sufficient.⁵

Moreover, as between mortgagees in possession and persons having subsequent interests, the Court will not appoint a Receiver against a mortgagee's own oath that something is due to him,⁶

¹ *Gibbins v. Mainwaring*, 9 Sim. 77; *Smith v. Smith*, 10 Hare, App. 71.

² *Pitcher v. Hellier*, 2 Dick. 580; *Maquire v. Allen*, 1 B. & B. 75.

³ It seems that this rule will not apply where the party in possession is merely so upon execution, under a judgment, and that, in such cases, a creditor, having taken out an execution, cannot hold property against an estate created prior to his debt; see 3 Swanst. 117. Upon this principle Lord Eldon made an order for the appointment of a receiver of the rents and profits of a rectory, at the instance of a second incumbrancer, although a third incumbrancer was in possession under a sequestration from the bishop, which, in contemplation of the Court, is equal to a judgment. *White v. Bishop of Peterborough*, 3 Swanst. 109. As between equitable creditors and judgment creditors having possession under writs of *elegit*, it is competent to the Court to appoint a receiver in favor of the equitable creditors, not disturbing the *just* rights of any of the judgment creditors in possession. *Davis v. Duke of Marlborough*, 1 Swanst. 74.

⁴ See *Quarrell v. Beckford*, 13 Ves. 377; *Codrington v. Parker*, 16 Ves. 469; *Berney v. Sewell*, 1 J. & W. 647; *Lancashire v. Lancashire*, 2 Beav. 120; *Hiles v. Moore*, 15 Beav. 175.

⁵ *Archdeacon v. Bowes*, 3 Anst. 752. See *Sea Ins. Co. v. Stebbins*, 8 Paige, 565; *Bank of Ogdensburg v. Arnold*, 5 Paige, 38; *Frelinghuysen v. Colden*, 4 Paige, 204.

⁶ *Rowe v. Wood*, 2 J. & W. 553. See *Bank of Ogdensburg v. Arnold*, 5 Paige, 38; *Frelinghuysen v. Colden*, 4 Paige, 204; *Sea Ins. Co. v. Stebbins*, 8 Paige,

unless the party making the application will offer to pay him off, according to his demand, as he states it himself; in which case, if the party will bring the mortgagee's own confession, that he has been paid off, or that he has refused to accept what is due to him, the Receiver will be appointed.¹

For this purpose the Court will require the mortgagee to state upon his oath what he believes to be due; and in taking the possession from him upon payment of what he swears to be due, it will make him give security to refund, if it shall appear, upon the account, that so much is not due; and where he will not swear that anything is due, the Court will appoint a Receiver.²

It is to be observed, that the refusal of the Court to appoint a Receiver, where the property is in possession of a party having the legal estate, occurs in those cases only in which the estate of the party in possession is prior to that of the parties to the litigation; where the right to the possession is the subject of dispute, and the plaintiff having an equitable interest claims the legal estate from the defendant in possession, there the Court will, if it sees clearly that the plaintiff has the right, and that the ultimate decree will be in his favor, appoint a Receiver pending the suit.

Thus, at the instance of a purchaser *pendente lite*, the Court being satisfied that the contract was one which it could enforce, a Receiver was appointed.³

Upon the same principle, where a bill was filed by creditors claiming satisfaction out of real and personal assets, and it appeared, by the answer of the person in possession of the real estate, that the real estate must eventually be responsible, as there was no personal estate to be applied to discharge debts, the Court appointed a Receiver in the first instance.⁴

565; *Quinn v. Brittain*, 3 Edw. Ch. 314; *Leahy v. Arthur*, 1 Hogan, 92. Receivers in mortgage cases are allowed with great caution; and will be appointed only where there is a clear inadequacy of security, or the rents have been expressly pledged for the debt. The best criterion of adequacy or inadequacy of the security in such cases, is the rental. *Shotwell v. Smith*, 3 Edw. Ch. 588.

¹ *Berney v. Sewell*, 1 J. & W. 746.

² *Chambers v. Goldwin*, cited 13 Ves. 377; *Quarrell v. Beckford*, *ibid.*; *Hiles v. Moore*, 15 Beav. 175.

³ *Metcalf v. Pulvertoft*, 1 V. & B. 180; and see *Shakel v. Duke of Marlborough*, 4 Mad. 463; *Free v. Hinde*, 2 Sim. 7.

⁴ *Jones v. Pugh*, 8 Ves. 71; *Fingal (Earl of) v. Blake*, 2 Moll. 52. As to receivers in creditor's suits, see further, *Bloodgood v. Clark*, 4 Paige, 575; *Browning v. Bettis*, 8 Paige, 568; *Fitzhugh v. Everingham*, 6 Paige, 29; *Osborn v.*

The Court has also appointed a Receiver against a party having possession under a legal title, where it was satisfied that such party was wrongfully entitled to such legal estate. Thus, where fraud was clearly proved and immediate danger was likely to result, if the intermediate possession should not be taken under the care of the Court, a Receiver was appointed.¹ This, however, is an extreme case, and not in accordance with the general habit of the Court.²

Upon the same principle, the Court interfered in *Podmore v. Gunning*.³ In that case a testator, by his will, bequeathed the residue of his real and personal estate to his wife, "having perfect confidence that she will act up to those views which I have communicated to her in the ultimate disposal of my property after her decease," and, upon the wife's dying without a will, the Court appointed a Receiver, upon an allegation in the bill, (supported by affidavit,) of a promise by the wife to her husband, on the faith of which he had made his will, that she would bequeath the residue of his property, after her decease, to the plaintiffs, who were his natural children.

It is to be observed that, in cases of this description, there were circumstances of either actual or constructive fraud, as well as of actual title, to induce the Court to interfere; where these circumstances are absent, and there is no case of spoliation, the Court will not appoint a Receiver upon mere ground of title in the plaintiff.⁴

But although the Court will not interfere upon the mere ground of title, it will appoint a Receiver at the instance of parties beneficially interested, even where there is no fraud or spoliation, provided it can be satisfactorily established that there is danger to the estate or fund, unless such a step is taken.⁵ Thus, in the case of executors, if the executor has wasted the effects, or in other respects misconducted himself, the Court will interfere by the appointment of a Receiver;⁶ upon this ground, also, where an

Heyer, 2 Paige, 342; *Haggarty v. Pittman*, 1 Paige, 298; *Parker v. Moore*, 3 Edw. Ch. 234; *Congden v. Lee*, 3 Edw. Ch. 304; *Hart v. Tims*, 3 Edw. Ch. 226.

¹ *Lloyd v. Passingham*, 16 Ves. 59; *Hugonin v. Baseley*, 13 Ves. 105; *Bainbridge v. Baddeley*, 3 Mac. & Gor. 413.

² *Stillwell v. Wilkins*, Jac. 280; 6 Mad. 41; *S. C. sub nomine Stillwell v. Williams*.

³ 5 Sim. 485.

⁴ *Toldervy v. Colt*, 1 Y. & C. Exch. Rep. 621.

⁵ *Parkhurst v. Kinsman*, 2 Blatch. C. C. 78.

⁶ *Anon.* 12 Ves. 5; *Middleton v. Dodswell*, 13 Ves. 261; see, also, *Havers v.*

executor has not done what he can to get in the personal estate, the Court will order a Receiver to be appointed.¹

But although a Receiver will be appointed as against an executor, where it is shown that there is a probability of danger to the property, it must be such danger as arises from the misconduct or neglect of the party, — mere poverty will not, of itself, constitute a sufficient ground for such an appointment.² Where, however, an executrix, who had been appointed guardian of her three children, by her husband, married a second husband in necessitous circumstances, the House of Lords directed a Receiver to be appointed to get in the outstanding personal estate.³ And where the husband of a woman, who had been appointed executrix, was in the West Indies, and was sworn to be in indifferent circumstances, a Receiver was also appointed.⁴ Where a personal representative is actually insolvent, a Receiver will be appointed; ⁵ therefore, if an executor has become bankrupt, or has taken the benefit of the Act for the Relief of Insolvent Debtors, the Court will appoint a Receiver; and if it should be necessary to bring actions at Law to recover part of the effects, since that must be in the name of the executor, the Court will compel him to allow his name to be used.⁶ It seems, however, to be doubtful, whether, if a person,

Havers, Barnardist. 22; Lord *v.* Purchase, 17 Beav. 171; Boyd *v.* Murry, 3 John. Ch. 4, 8. Wherever the appointment of a receiver is sought against an executor or administrator, it is necessary to establish by suitable proofs, that there is some positive loss, or danger of loss of the funds; as, for instance, some waste or misapplication of the funds, or some apprehended danger from the bankruptcy, insolvency, or personal fraud, misconduct, or negligence of the executor or administrator. 2 Story Eq. Jur. § 836; Mandeville *v.* Mandeville, 8 Paige, 475; Orphan Asylum *v.* M'Cartee, 1 Hopk. 435. The fact, that a trustee mixes the trust fund with his own is not a sufficient ground for the appointment of a receiver. Orphan Asylum *v.* M'Cartee, 1 Hopk. 435.

¹ Richards *v.* Perkins, 3 Y. & C. Exch. Rep. 299. Not, however, where the executor is admitted to be solvent, and the fund is in no danger. Tennent *v.* Tennent, 1 Craw. & Dix, 241.

² Hathornthwaite *v.* Russell, 2 Atk. 126; Howard *v.* Papera, 1 Mad. 142; Anon. 12 Ves. 4; but see Scott *v.* Becher, 4 Pri. 346.

³ Dillon *v.* Lady Mount Cashell, 4 Bro. P. C. ed. Toml. 300–312.

⁴ Taylor *v.* Allen, 2 Atk. 213; Smith *v.* Smith, 10 Hare, App. 71.

⁵ Where an executor has removed from the State, leaving his *cestui que trust* and the trust estate, the Court will, on the application of the *cestui que trust*, appoint a receiver. *Ex parte* Galluchat, 1 Hill Ch. 150. But the Court has no power to substitute one executor in the place of another. *Ib.*

⁶ Utterson *v.* Mair, 2 Ves. jr. 95; 4 Bro. C. C. 269, S. C.; Scott *v.* Becher, *ubi supra*.

known by a testator to be a bankrupt or insolvent, be appointed an executor by his will, such person can be controlled by the appointment of a Receiver ;¹ but it is not to be inferred, from the circumstances of the will having been made some time before the commission issued, and not altered afterwards, that the testator had a deliberate intention to intrust the management of his estate to an insolvent executor.²

The same grounds which will induce the Court to take away from an executor the possession, or the right to the possession, of the testator's property, by the appointment of a Receiver, in case of his misconduct or of his bankruptcy or insolvency, will induce the Court to interfere in the case of any party clothed with the character of a trustee, and that whether he is a mere trustee or a trustee having an interest in the estate or fund.³

Thus, where a trustee refuses to act, the Court will, on the application of the persons beneficially interested, appoint a Receiver ;⁴ and so where several trustees under a settlement, in consequence of disputes amongst themselves, permitted the rents of the trust estate to fall in arrear, the Court not only appointed a Receiver to collect the rents, but ordered the costs of the suit to be paid by the trustees.⁵

It may be observed, that, although the Court will, in general, where there has been a clear breach of trust on the part of a trustee, interfere to take the possession from him pending the suit in which the discussion of his conduct is involved, it will not, where property has been applied without complaint for a series of years, according to a uniform course of management which has been sanctioned by the parties beneficially interested, appoint a Receiver by interlocutory order, on the ground that such application of property is a breach of trust, unless it is perfectly clear that the

¹ *Gladdon v. Stoneman*, 1 Mad. 143, n. ; *Langley v. Hawk*, 5 Mad. 46 ; and see the observations of the M. R. in *Stainton v. The Carron Company*, 18 Beav. 146, 161.

² *Ibid.* ; *Williams on Executors*, (ed. 3,) vol. 1, p. 169.

³ If an assignee becomes insolvent, the assignor may apply for the appointment of a receiver to execute the trust declared in the assignment. *Keys v. Bush*, 2 Paige, 211. So where a debtor in failing circumstances, assigns his property to a person, who is insolvent, in trust for his creditors, a receiver will be appointed, upon the application of such creditors, to take charge of such property so assigned. *Haggarty v. Pittman*, 1 Paige, 298.

⁴ *Brodie v. Barry*, 3 Mer. 695.

⁵ *Wilson v. Wilson*, 2 Keen, 249.

party in whom the property is vested is a mere naked trustee, and has not, even to a limited extent, any of the rights and interests of an owner. Upon this ground, a motion for the appointment of a Receiver of the estates vested in the Irish Society, at the instance of one of the London Companies, who claimed a beneficial interest in the income of the estates, was refused.¹

The fact of acquiescence, on the part of those beneficially interested, may constitute a ground for the Court refraining to disturb the possession by the appointment of a Receiver.²

It is to be observed that, in cases of misconduct by trustees, either by *misfeasance* or *nonfeasance*, the Court will appoint a Receiver, as well in cases in which the trust arises by implication, as in those where it is expressed. Upon this principle the Court has held, that where a man takes a legal estate, subject to equitable interests, he must satisfy those interests or submit to a Receiver.³

Upon the same principle, if a tenant for life of leaseholds is bound to renew, he is, in such case, clothed with the character of trustee; and if by his threats or acts he manifests an intention to suffer the lease to expire, the Court will appoint a Receiver, in order to provide a fund for renewal;⁴ and if a tenant for life has already allowed the period of renewal to pass, the rents and profits will be sequestered either for procuring a renewal or finding the remainderman a compensation.⁵

Upon the same ground, the Court of Chancery in Ireland has appointed a Receiver to provide a fund for the payment of the interest and costs due to a purchaser, who had been discharged on a report that a good title could not be made, and there was no fund in Court out of which such interest and costs could be paid.⁶

¹ *Skinner's Company v. Irish Society*, 1 M. & C. 162; *George v. Evans*, 4 Y. & C. 211.

² *Gray v. Chaplin*, 2 Russ. 126. Nor will a receiver be appointed on the application of one of several parties interested. *Barkley v. Reay*, 2 Hare, 308.

³ *Pritchard v. Fleetwood*, 1 Mer. 54. Where land is charged with the payment of an annual sum, a receiver may be put upon it as a means of enforcing payment. *Owing's Case*, 1 Bland, 297. See *Cairnes v. Chabert*, 3 Edw. Ch. 312; *Rogers v. Ross*, 4 John. Ch. 388.

⁴ See *Bennett v. Colley*, 2 M. & K. 225, 233, and 5 Sim. 192, S. C.

⁵ See *Lord Montfort v. Lord Cadogan*, 17 Ves. 485.

⁶ *Hill v. Kirwan*, 1 Hog. 175. The usual course, however, in such cases, is to order the costs to be paid by the plaintiff, without reference to the question, how they are to be ultimately satisfied.

It may be mentioned here, that a similar order for the appointment of a Receiver of the rents and profits of an estate, for the purpose of accumulating a fund, was made by Sir L. Shadwell, in a case where the party had fraudulently obtained a sum of money, to which the trustees of a settlement were entitled.¹

As the object of appointing a Receiver is, usually, the preservation and protection of the property in dispute pending a litigation, the Court will not appoint a Receiver on the application of a party who possesses the power of protecting the property without it; consequently, a Receiver will not be appointed on behalf of a mortgagee who has the legal estate, as he has nothing to do but to take possession; ² and in general, wherever there is a dispute respecting an estate which depends upon a mere legal title, the Court will not grant a Receiver, because the plaintiff has his remedy by asserting his title in a Court of Law.³

Thus, where an heir at law disputes a will against the devisees in possession, the Court will refuse a Receiver, although there may be a dispute in the Ecclesiastical Court concerning probate; because he may, if he is entitled as heir, bring his ejectment against the devisees.⁴

A Receiver may, however, be appointed where it is shown to be important that the Court should interfere for the protection of the estate or of the rents and profits. Thus, where it can be established that there is danger of the interim rents being lost, from the refusal of a tenant to pay them, the Court will appoint a Receiver; ⁵ but there must be a strong case shown of danger to the intermediate rents, and also a strong ground of title in the plaintiff.⁶

The Court will likewise extend the application of the principle of providing for the safety of property pending a litigation, to cases where the litigation is in another Court; thus, during a litigation in the Ecclesiastical Court for probate or administration, a Court of Equity will entertain a bill for the mere preservation of

¹ *Woodyatt v. Gresley*, 8 Sim. 180; *Middleton v. Sherburne*, 4 Y. & C. 358.

² *Berney v. Sewell*, 1 J. & W. 647; *Sheril v. Young*, 5 Beav. 557.

³ *Mordaunt v. Hooper*, Amb. 311; *Lancashire v. Lancashire*, 9 Beav. 120; *Clark v. Dew*, 1 R. & M. 109.

⁴ *Knight v. Duplessis*, 1 Ves. 325; *Fingal (Earl of) v. Blake*, 1 Moll. 158; 2 Moll. 50; see also *Lloyd v. Trimleston*, 2 Moll. 81.

⁵ *Fingal v. Blake*, *ubi supra*.

⁶ *Mordaunt v. Hooper*, *ubi supra*.

the property of the deceased, till the litigation is determined, and appoint a Receiver, although the Ecclesiastical Court, by granting an administration *pendente lite*, might provide for the collection of the effects.¹ And a Court of Equity will appoint a Receiver, as well when the litigation in the Ecclesiastical Court is to recall administration or probate already granted, as in a case where no administration has been granted before the application to the Court of Chancery.² But the mere circumstance that there has been a suit instituted in the Ecclesiastical Court to recall a probate already granted, does not give the Court of Chancery jurisdiction to interfere; for if that were so, it is evident that, in order to obtain a Receiver, it would be only necessary to institute a suit in the Ecclesiastical Court.³ The Court of Chancery, therefore, will look into the case, to see whether, on the whole, such a case is made as justifies its interference; and it should seem, that if it appears, from all the circumstances, that there is substantially a *lis pendens* in the Ecclesiastical Court, a Receiver may be appointed notwithstanding there is no ground laid for the interference of the Court of Chancery, in respect of any improper conduct of the parties.⁴

The Court will also grant a Receiver, pending an appeal to the Privy Council from a decision of the Ecclesiastical Court upon the validity of a will, there being no power in the Privy Council to protect the property pending the appeal.⁵ So, also, in *Wood v. Hitchings*, where the Ecclesiastical Court had by its sentence rejected the testamentary paper of the deceased and declared for an intestacy, whereupon the parties interested under the will appealed to the Privy Council, which inhibited the Ecclesiastical Court from

¹ Lord Red. 135, 136; *King v. King*, 6 Ves. 172; *Edmunds v. Bird*, 1 V. & B. 542; *Atkinson v. Henshaw*, 2 V. & B. 85; *Ball v. Oliver*, *ibid.* 96; *Watkins v. Brent*, 1 M. & C. 102, overruling the distinction taken by Lord Erskine, in *Richards v. Chave*, 12 Ves. 462; *Anderson v. Guichard*, 9 Hare, 275.

² *Rutherford v. Douglas*, 1 S. & S. 111, n. (d); *Ball v. Oliver*, *ubi supra*.

³ *Watkins v. Brent*, 1 M. & C. 97; see also *Knight v. Duplessis*, 1 Ves. 324, and a MS. case argued on demurrer, 13th June, 1812, cited in 1 Mad. Chan. 225, n. 1, (2d ed.); *Dew v. Clarke*, 1 S. & S. 114.

⁴ 1 Williams on Executors, 389; *Watkins v. Brent*, 1 M. & C. 97; *Jones v. Frost*, 3 Mad. 1; *Jac.* 466; *Marr v. Littlewood*, 2 M. & C. 454; *Edwards v. Edwards*, 10 Hare, App. 63; *Whitworth v. Whyddon*, 2 Mac. & Gor. 52.

⁵ *Day v. Croft*, Rolls, 9th November, 1828, cited 2 Beav. 293; *Wood v. Hitchings*, 2 Beav. 289.

proceeding, Lord Langdale, M. R., whose opinion was afterwards confirmed by Lord Cottenham, held, that the circumstance of there being no person authorized to protect and collect the estate alone justified the appointment of a Receiver by this Court, even though the application was made by the party appellant, who, if the decision of the Ecclesiastical Court were correct, had no interest in the estate of the deceased.¹

Upon the principle that the Court will not appoint a Receiver where the party applying has an estate which he can assert at Law, the Court will refuse to interfere against a joint-tenant or tenant in common in possession, at the suit of another joint-tenant or tenant in common, because the party complaining may at Law relieve himself by the writ of partition.² It is upon this ground, that the Court has constantly refused to restrain a tenant in common from cutting timber, or doing any other act not amounting to destruction.³

The Court will also appoint a Receiver of a mine, where it belongs to several parties who are working together, although the parties are tenants in common of it,⁴ the Court, according to Lord Hardwicke, considering property of this sort as in the nature of a trade ;⁵ “ and where persons have different interests in it, it is to be regarded as a partnership ; and the difficulty of knowing what is to be paid for wages and the expense of management, gives the Court a jurisdiction as to *mesne* profits which it would not assume with respect to other lands.”

And here it may be noticed, that, in cases of partnership, the Court has frequently appointed a Receiver of the partnership estate ;⁶ but the general rule appears to be, that the Court will not

¹ Day v. Croft, Rolls, 9th November, 1828, cited 2 Beav. 293 ; Wood v. Hitchings, 2 Beav. 293, n.

² Tyson v. Fairclough, 2 S. & S. 142–144. But see Williams v. Jenkins, 11 Geo. 595, cited post, 1420 in note. In Massachusetts, receivers of rents and profits may be appointed in suits in Equity between corporations, joint-tenants, and tenants in common and their legal representatives. Genl. Sts. c. 113, s. 2.

³ Ibid. ; Clegg v. Fishwick, 1 Mac. & Gor. 294.

⁴ Jeffreys v. Smith, 1 J. & W. 298.

⁵ See Story v. Lord Windsor, 2 Atk. 620, and cases there cited ; Jesus College v. Bloom, Amb. 56 ; Sayer v. Pierce, 1 Ves. 232, and Belt's Supp. 127, S. C. ; Crawsfray v. Maule, 1 Swanst. 518.

⁶ Wilson v. Greenwood, 1 Swanst. 471, 480 ; Tibbitts v. Phillips, 10 Hare, 358 ; Innes v. Lansing, 7 Paige, 583. Upon a bill filed by one of the partners to close

appoint a Receiver of partnership effects, unless it appears that the plaintiff will be entitled to a dissolution at the hearing, or unless the suit be so framed that a decree may be made, according to the intention of an instrument, which, by the agreement of the parties, is to regulate the mode of its being carried on.¹

It is, however, to be observed, that there are cases in which Lord Eldon himself has held, that, even where no dissolution is sought, the Court will grant a Receiver. These are where suits have been instituted to compel partners to act according to the provisions of instruments into which they have entered; in such cases, the Court will take care that the decree shall not be defeated by anything to be done in the mean time, and will appoint a Receiver to protect the property.²

up a partnership concern, it is a matter of course to appoint a receiver, if the parties cannot agree among themselves as to the disposition and control of the property. *Martin v. Van Schaick*, 4 Paige, 479. So a receiver will be appointed, as a matter of course, where either partner has a right to dissolve the partnership, and the articles of copartnership do not provide for the settlement of the concern, upon a bill filed for that purpose. *Law v. Ford*, 2 Paige, 310. A receiver may be appointed at the instance of a partner, alleging that the firm is insolvent, and that his copartners are wasting the effects. *Williamson v. Wilson*, 1 Bland, 423. A receiver will not be appointed merely because partners quarrel. *Henn v. Walsh*, 2 Edw. Ch. 128. There can be no ground for a receiver in a case of partnership, when the partner applying to the Court has the property in his own possession, and the other does not object to such possession. *Smith v. Lowe*, 1 Edw. Ch. 33. Where a partnership is alleged on the one side, and denied on the other, and a motion is made for a receiver, the Court, if it directs an issue as to partnership or no partnership, usually declines to appoint a receiver until that question is determined. *Peacock v. Peacock*, 16 Vesey, 49; *Chapman v. Beach*, 1 J. & W. 549; *Fairburn v. Pearson*, 2 Mac. & G. 144.

¹ *Const v. Harris*, T. & R. 496, 517; *Goodman v. Whitecombe*, 1 J. & W. 589, 592; *Collyer on Part.* (5th Am. ed.) § 353. An issue will be directed to try the fact of the dissolution; *Fairburn v. Pearson*, 2 Mac. & G. 144.

² *Const v. Harris*, T. & R. 496. But Courts of Equity are by no means anxious to take upon themselves the management of a partnership business, and they will, it is said, never do so save with a view to a dissolution or final winding up of the affairs of a concern. *Hall v. Hall*, 3 Mac. & G. 79; *Roberts v. Eberhardt*, Kay, 148; *Goodman v. Whitecombe*, 1 Jac. & W. 589; *Harrison v. Armitage*, 4 Madd. 143; *Smith v. Jeyes*, 4 Beav. 503; *Waters v. Taylor*, 15 Vesey, 10; *Evans v. Coventry*, 5 De G., Mac. & G. 911; *Garretson v. Weaver*, 3 Edw. Ch. 385. To authorize the appointment of a receiver, in a copartnership suit, it must be such a case as would authorize a decree for a dissolution. Where a dissolution has already taken place, or it is apparent that it will be decreed, on the ground of some breach of duty or contract, a receiver will be appointed. *Henn v. Walsh*, 2 Edw. Ch. 129; *Story Partnership*, § 228, 229, 230, 231, and notes; *Law v. Ford*,

The rules with regard to the appointment of a Receiver in the case of partnerships are very clearly laid down in Mr. Collyer's valuable treatise on the Law of Partnership,¹—"Where a dissolution is intended, or has already taken place, a Court of Equity will appoint a Receiver, provided there be some breach of the duty of a partner, or of the *contract* of partnership.² Thus if, in breach of moral obligation, one partner unjustly takes possession, and refuses to give security to his copartner for his share of the stock, moneys, and securities;³ or, if he in any respect behaves *unrighteously* against the interest of the other partner, a Receiver will be appointed.⁴ So, also, if in the breach of the contract of partnership, he carries on the trade with the partnership effects on his separate account, after the dissolution,⁵ and thus or in any other manner excludes his copartner from that share to which he is entitled in winding up the concern, a Receiver will be appointed."⁶

The same rules which prevail respecting the appointment of a Receiver, in a suit between partners, are applicable in a suit

2 Paige, 310; *Williamson v. Wilson*, 1 Bland, 418. Where it is necessary to preserve the good-will of the business, the receiver may be directed to carry it on under the direction of the Court, until a sale can be effected. *Martin v. Van Schaick*, 4 Paige, 479. Collyer on Partn. (5th Am. ed.) § 353 *et seq.* It is not necessary, in order to induce the Court to interfere, that the plaintiff should, by his bill, expressly pray for a dissolution. See *Sheppard v. Oxenford*, 1 K. & J. 491; 2 Lindley Partn. (Eng. ed.) 849, 850.

¹ Collyer on Partn. (5th Am. ed.) § 354.

² *Harding v. Glover*, 18 Ves. 281; *Estwick v. Conningsby*, 1 Vern. 118; *Henn v. Walsh*, 2 Edw. Ch. 129; *Gowan v. Jeffries*, 2 Ashmead, 296; *Story Partn.* §§ 228 to 231; *Law v. Ford*, 2 Paige, 310. In *Skip v. Harwood*, a receiver was appointed of a brewery.

³ *Peacock v. Peacock*, 16 Ves. 49; *Milbank v. Revet*, 2 Mer. 405.

⁴ If partners quarrel, and one of them behaves unrighteously against the interest of the other, a receiver will be appointed; but if partners quarrel, a receiver will not merely on that account be appointed. Per Lord Eldon, *Texeira v. Da Costa*, in Chancery, November, 1815, Cook's MSS.

⁵ *Harding v. Glover*, *ubi supra*; *Blakeney v. Dufaur*, 15 Beav. 40.

⁶ The dissolution, which takes place on the refusal of an appointee under a will to become a partner, is clearly not a dissolution arising from the exclusion of the appointee by the surviving partners, and will therefore be no foundation for a receiver. *Kershaw v. Matthews*, 2 Russ. 62. A Court of Equity has authority to appoint a receiver, at the instance of one tenant in common against his co-tenants, who are in possession of undivided valuable property, receiving all the rents and profits, and excluding such tenant from the receipt of any portion thereof, when such co-tenants are insolvent. *Williams v. Jenkins*, 11 Georgia, 595.

between the representative of a deceased partner and the surviving partner.¹

Where all the partners are dead, and a suit is instituted between their representatives, a Receiver will be appointed as a matter of course ; “for,” as Lord Kenyon observed, “where there is a copartnership there is a confidence between the parties ; and if one dies, the confidence in the other partner remains, and he shall receive ; but where both are dead, there is no confidence between the representatives, and therefore the Court will appoint a Receiver.”²

The Court will also appoint a Receiver, pending an investigation into the title to an estate, in a suit for the specific performance of an agreement ; and this it will do at the suggestion of the vendor, reserving, however, the consideration of the question at whose expense it should be ;³ in *Boehm v. Wood*,⁴ where an appointment of this nature had been made, and the purchaser was afterwards compelled to take the title, Lord Eldon held it to be clear that the Receiver was to be considered as his Receiver.

In *Hall v. Jenkinson*,⁵ which was also a case of specific performance, the Court, at the instance of the plaintiffs, granted a Receiver after the answer of the purchaser, who was in possession, upon his admission of insolvency and intention to sell and convey.

A Receiver may likewise be appointed of the rents and profits of an infant's estate, where a bill has been filed ;⁶ but it has not been the practice to appoint a Receiver, in such cases, on petition merely.⁷ It seems, however, that in the case of idiots or lunatics,

¹ *Clegg v. Fishwick*, 1 Mac. & Gor. 294 ; *Collyer on Partnership* (5th Am. ed.) § 357. If the surviving copartner wastes the funds, the Court would, on a proper application, protect the estate of his deceased copartner, by obliging him to give security, or will appoint a receiver. *Higginson v. Adir*, 1 Desaus. 429.

² *Phillips v. Atkinson*, 2 Bro. C. C. 272. Receivers may be appointed, in Massachusetts, to take charge of the estate and effects of a corporation, and to collect the debts and property due and belonging to it, &c., when the charter of the corporation expires or is annulled, or the corporation is dissolved, under the provisions of the law. Genl. Sts. c. 68, s. 37.

³ *Boehm v. Wood*, 2 J. & W. 236.

⁴ T. & R. 332, S. C.

⁵ 2 V. & B. 125. And see *Dawson v. Yates*, 2 Beav. 301 ; *Osborne v. Harvey*, 1 Y. & C. C. 116 ; *Stratton v. Davidson*, 1 R. & M. 484.

⁶ *Anon.*, 1 Atk. 489, 578 ; *Ex parte Whitfield*, 2 Atk. 315. See *supra*, p. 1399.

⁷ See, however, now, *Seton on Decrees*, 316.

a Receiver has been appointed upon petition, where no person could be found disposed to act as committee.¹

Having considered the circumstances under which the Court will appoint a Receiver, it is convenient in this place to call the reader's attention to the nature of the property which the Court will take under its protection by means of such appointment.

It may be collected from what has been already laid down, that a Receiver may be appointed of the rents and profits of lands, houses, &c., and also of all personal estate which is capable of being reduced into possession.² In *Davis v. The Duke of Marlborough*,³ it was held, that in favor of equitable creditors the Court will appoint a Receiver of all property against which a legal creditor might obtain execution; upon this ground a Receiver has been appointed of the profits of a rectory,⁴ under an *elegit*. The appointment is not, however, confined to such property as is liable to be taken under an execution at Law, but has been extended to whatever is considered in Equity as assets; and, therefore, in *Blanchard v. Cawthorne*⁵ a Receiver was appointed at the instance of a judgment creditor of the office of master forester of a royal forest.

So, also, in *Palmer v. Vaughan*,⁶ the profits of the office of Clerk of the Peace for a county having been assigned for the payment of creditors, a Receiver was appointed, pending the discussion of a question, as to the validity of the assignment: but in *Cooper v. Reilly*⁷ a Receiver was refused, pending such a discussion, of the salary of Assistant Parliamentary Counsel to the Treasury, on the ground that the salary of such an office was not assignable, upon grounds of public policy.

It has already been shown, that a pension granted by the crown

¹ *Ex parte Warren*, 10 Ves. 622; and see *Anon.* 1 Atk. 578.

² *Walkens v. Brent*, 1 M. & C. 103; *Richards v. Perkins*, 2 Y. & C. 299; *Rendall v. Rendall*, 1 Hare, 152.

³ 2 Swanst. 132.

⁴ *Silver v. Bishop of Norwich*, 3 Swanst. 112; *White v. Bishop of Peterborough*, *ibid.* 109. See, however, *Hawkins v. Gathercole*, 6 De Gex, Mac. & G. 1.

⁵ 4 Sim. 566.

⁶ 3 Swanst. 173.

⁷ 2 Sim. 560; 1 R. & M. 560, S. C.

is capable of being taken under a sequestration for want of an answer,¹ it may therefore be assumed, that such a pension may be the subject of a Receiver; the rule, however, will not extend to the half-pay of an officer in the Army or Navy, which, as we have also seen, is, upon grounds of public policy, exempt from the operation of a sequestration.² So, also, it has been held, that a pension granted by the 4 & 5 Ann. c. 4, for the more honorable support of the dignities of the Duke of Marlborough, to the persons, severally and successively, to whom the same should come by virtue of that Act, with a proviso, that the acquittance of every such person should be a sufficient discharge, was, upon grounds of public policy, inalienable, and therefore not the subject of a Receiver; although the *estates* (which by the 5 Ann. c. 3, were limited to the Duke for life, with remainder in tail male, &c., in such manner that they might always go along and be enjoyed with the titles and dignities, with a proviso, that they should not be aliened to the injury of the persons in remainder,) were held to be alienable during the life of the person in possession, and to be therefore the subject of a Receiver during his life.³ A Receiver will also be appointed of heirlooms,⁴ or of turnpike tolls,⁵ but the Court will not appoint a Receiver of parochial rates, which are to be assessed and collected at a future period.⁶

It is not necessary, in order to authorize the Court to make an order for a Receiver, that the property in respect of which he is to be appointed should be in England; a Receiver will be appointed here, of property in the East Indies,⁷ in which case the Receiver must find sureties who are resident in England. A Receiver may also be appointed of estates in Ireland, but it seems that in such cases the recognizances of the Receiver and his sureties may be entered into and enrolled in that country.⁸

¹ Ante, pp. 1068, 1069. And see *Nond v. Backhouse*, 2 Y. & C. C. C. 529; *Tunstall v. Sir W. Boolber*, 10 Sim. 542.

² Ibid.

³ *Davis v. Duke of Marlborough*, 1 Swanst. 74; 2 Swanst. 125.

⁴ *Shaftesbury v. Duke of Marlborough*, Seton on Decrees, 330.

⁵ *Knapp v. Williams*, 4 Ves. 430; *Dumville v. Ashbrooke*, 3 Russ. 98, n.

⁶ *Drewry v. Barnes*, 3 Russ. 94.

⁷ *Coekburn v. Raphael*, 2 S. & S. 453; *Smith v. Smith*, 10 Hare, App. 71.

⁸ See stat. 43 Geo. III. c. 90. The order directs the recognizances of the receiver and his sureties to be acknowledged before a Master of the Court of Chancery in Ireland, and to be entered and enrolled there, and the entering and

It may also be mentioned, that officers in the nature of Receivers are frequently appointed of plantations in the West Indies, but as a plantation in the West Indies partakes, in some measure, of the nature of a manufactory or trade, instead of a Receiver, the person appointed is usually called a Manager.

SECTION II.

Who may be a Receiver.

GENERALLY speaking, a Receiver should be a person wholly disinterested in the subject-matter of the suit, but in some cases, although he may be mixed up with the suit, a person so situated may be appointed.¹ Thus, in a suit to establish a will, the heir-at-law has been appointed Receiver till after the trial of an issue. So, also, it has been held, that a trustee may, under circumstances, be a Receiver,² provided he will accept the appointment without emolument.³ But in no case can a trustee, or other party to a cause, be a Receiver *with emolument*, unless no one else can be procured who will act with the same benefit to the estate;⁴ and it is to be observed, that even where he is disposed to act without emolument, the Court will not appoint a trustee to be a Receiver, where he is the person to watch and check the Receiver for the benefit of the parties interested.⁵

Upon the same principle it has been held, that, as it is the duty of the next friend of an infant to watch the accounts and conduct of a Receiver of the infant's estate, the two characters are incompatible with each other;⁶ and, in *Taylor v. Oldham*,⁷ it was held, that the son of a next friend ought not to be a Receiver.

enrolling to be duly certified to the Court by the Master of the Court of Chancery in Ireland.

¹ *Fingal v. Blake*, 2 Moll. 50. See *Downshire v. Tyrrell*, Hayes, 354.

² *Sykes v. Hastings*, 11 Ves. 363.

³ A party to the suit could not be appointed by a Master, unless the order of a reference contained an express authority to that effect. See *Blakeney v. Dufaur*, 15 Beav. 44.

⁴ *Fingal v. Blake*, 2 Moll. 50; *Sykes v. Hastings*, 11 Ves. 364; ——— *v. Jolland*, 8 Ves. 72; *Anon.* 3 Ves. 515.

⁶ *Sutton v. Jones*, 15 Ves. 588; but see *Hoffman v. Duncan*, 18 Jur. 69.

⁶ *Stone v. Wishart*, 2 Mad. 64.

⁷ *Jac.* 527, 529.

Upon similar grounds it has been held, that a solicitor in the cause cannot be appointed a Receiver, because it is his duty to control the Receiver's accounts.¹ It is no objection, however, to a person proposed, that he is a practising barrister.²

It has been held, that the Receiver-General of Taxes for a county cannot be appointed a Receiver; for having given, as such, security to the crown, if he were to become indebted to the crown, and to the estate, the crown might, by its prerogative process, sweep away all his property.³ Upon the same ground it might be held, that any person who is in the situation of an accountant to the crown would be objectionable.⁴

SECTION III.

Appointment of Receivers.

THE Court has no jurisdiction to appoint a Receiver, unless a

¹ *Garland v. Garland*, 2 Ves. jr. 137. A receiver cannot, in any way, employ counsel engaged in the suit in which he is receiver. *Adams v. Woods*, 8 Cal. 306.

² *Garland v. Garland*, 15 Ves. 283; *Wynne v. Lord Newborough*, 15 Ves. 283.

³ *Attorney-General v. Day*, 2 Mad. 254.

⁴ In the case of the Franklin Bank, as referred to in *The Attorney-General v. Bank of Columbia*, 1 Paige, 417, Chancellor Walworth decided, that it was improper for an officer of an insolvent corporation to be the receiver of its property. This case arose before the passage of the Revised Statutes in New York. But under the New York Act of voluntary dissolution of corporations, an officer of a corporation can be appointed a receiver. 2 Rev. Stat. (N. Y.) 468, § 66. Still it does not appear that it is obligatory on the Court to appoint the officers receivers, under this statute. *Edwards, Receivers*, 57, 58. In the *Matter of the Eagle Iron Works*, 8 Paige, 385; S. C. 3 Edw. Ch. 385, it was held, that the president and bookkeeper of an insolvent manufacturing corporation can be appointed receivers.

Where, in the case of a partnership, a proper case for the appointment of a receiver is made out, and the partner actually carrying on the business has not been guilty of such misconduct as to have rendered it unsafe to trust him, the Court generally appoints him the receiver and manager without salary. It is usual, however, to require him to give security duly to manage the partnership affairs, and to account for money received by him. See *Wilson v. Greenwood*, 1 Swanst. 471; *Blakeney v. Dufaur*, 15 Beav. 40. A partner who is appointed receiver becomes the officer of the Court, and must act and be respected accordingly. 2 *Lindley Partn.* (Eng. ed.) 856, 857.

cause is pending;¹ therefore, a Receiver cannot be appointed of an infant's estate, upon petition "in the matter of the infant."² This rule does not apply to the Lord Chancellor's jurisdiction in lunacy, which is distinct from that of the Court of Chancery.

When it is intended to apply to the Court, before decree, for the appointment of a Receiver, it is usual to insert in the prayer of the bill a request that the Court will, if necessary, appoint one; this, however, is not in all cases absolutely requisite, and a Receiver has been granted in an infant's suit although not prayed for,³ and it appears in general, that if the *facts* of the case authorize it, the Court may appoint a Receiver, although there is no prayer to that effect in the bill.⁴

An application for a Receiver may be by petition, but it is usually made by motion, of which notice must be given;⁵ a Receiver is also appointed by decree.⁶

With respect to the period of the cause when a Receiver will be appointed, the Court will not only appoint a Receiver before answer,⁷ but it has, in cases of urgency, entertained the application before appearance;⁸ it is to be observed, however, that the general rule of the Court is, that a motion for a Receiver cannot, like a

¹ Anon. 1 Atk. 578.

² *Ex parte* Whitfield, 2 Atk. 315; *Ex parte* Radcliffe, 1 J. & W. 639. This proposition seems doubtful according to modern practice. See Seton on Decrees, 352.

³ *Simpson v. Gutteridge*, 1 Turn. C. P. 448.

⁴ *Hart v. Tulk*, 6 Hare, 611; *Ramsbottom v. Freeman*, 4 Beav. 145; *Meaden v. Sealey*, 6 Hare, 620; *Dowling v. Hudson*, 14 Beav. 423. The bill must lay the foundation for the appointment of a receiver by stating the facts which show the necessity and propriety of it. *Tomlinson v. Ward*, 2 Conn. 396.

⁵ *Hungerford v. Cushing*, 8 Wis. 320; *Nusboum v. Stein*, 12 Maryland, 315; *Johns v. Johns*, 23 Geo. 31.

⁶ See 2 Seton on Decrees, (3d Eng. ed.) 1002. In cases where it is proper to appoint a receiver *ex parte*, the particular circumstances which render such summary proceedings necessary should be distinctly stated in the bill or petition, on which the application is founded. *Verplanck v. Merc. Ins. Co.*, 2 Paige, 438.

⁷ *Aberdeen v. Chitty*, 3 Y. & C. 379. It must be a strong, special ground to induce the Court to appoint a receiver before answer. *Edwards, Receivers*, 10; *Bloodgood v. Clark*, 4 Paige, 574; *Osborn v. Heyer*, 2 Paige, 342, 343; *West v. Swan*, 3 Edw. Ch. 420; *Willis v. Corlies*, 2 Edw. Ch. 281; *Williams v. Jenkins*, 11 Geo. 595.

⁸ *Tanfield v. Irvine*, 3 Russ. 149; *Vann v. Burnett*, 2 Bro. C. C. 157; *Meaden v. Sealey*, 6 Hare, 620; *Dowling v. Hudson*, 14 Beav. 423. See *Johns v. Johns*, 23 Geo. 31.

motion for an injunction, be made without notice ;¹ if, therefore, a Receiver is to be applied for, before appearance, notice of the motion must be served upon the defendant personally, to authorize which, there must, in some cases, be a previous application to the Court for leave to make such service ;² the fact of which having been obtained must be mentioned in the notice of motion. The rule, however, which requires previous notice to be served upon a defendant who has not appeared, is subject to exception where the defendant is resident out of the jurisdiction of the Court, and cannot be served.³

The Court will also appoint a Receiver after an interlocutory decree, and this it will do upon motion,⁴ notwithstanding a reservation of all matters under the decree ; because such an appointment is a mere provisional proceeding, and does not affect the question between the parties.⁵ A Receiver has also been appointed at the hearing, although there was no prayer to that effect in the bill.⁶

The application for the appointment of a Receiver in a cause is made to the Court itself, although, after such an order has been made, vacancies in the office may be filled up in chambers.⁷

¹ Per Leach, Arg. 1 V. & B. 183. As a general rule, a receiver should not be appointed without notice to the parties interested. *People v. Norton*, 1 Paige, 17. But this rule is subject to exceptions in special cases, where irreparable injury would be sustained by the delay. *Ib.* ; *Gibson v. Martin*, 8 Paige, 481 ; *Johns v. Johns*, 23 Geo. 31 ; *Treibart v. Burgess*, 11 Maryland, 452. As, where the property to which the receivership relates would be likely to perish before the defendant could have notice and be heard on the application for a receiver. *Gibson v. Martin*, 8 Paige, 481.

² *Hill v. Rimell*, 2 M. & C. 641.

³ Ante, pp. 1407, 1408. See *Gibbins v. Mainwarring*, 9 Simons, 77 ; *Verplank v. Merc. Ins. Co.*, 2 Paige, 438. A receiver ought not to be appointed on an *ex parte* application, where an advertisement for the defendant, a non-resident, is running for his appearance, unless special circumstances are shown. *Sanford v. Sinclair*, 8 Paige, 373 ; S. C. 3 Edw. Ch. 393. But such an appointment may be made *ex parte*, where it is necessary to prevent the property from being wasted or removed beyond the jurisdiction of the Court. *Ib.*

⁴ *Bowman v. Bell*, 14 Sim. 392 ; where the decree was not interlocutory.

⁵ *Cooke v. Gwyn*, 3 Atk. 690 ; and see *Attorney-General v. Mayor of Galway*, 1 Moll. 95 - 104 ; *Hiles v. Moon*, 15 Beav. 175.

⁶ *Osborne v. Harvey*, 1 Y. & C. 116.

⁷ *Grote v. Bing*, 9 Hare, App. 1. A receiver will not be appointed over the possession of another receiver ; but the proper motion is, that the receiver already appointed shall be extended to the cause in which it is sought to appoint one.

Until the recent Act for the amendment of the practice of the Court of Chancery, upon an application for the appointment of a Receiver before the hearing of the cause, the plaintiff was confined, in support of his case, to admissions from the defendant's answer; but now, by the 59th section of 15 & 16 Vict. c. 86, "Upon application by motion or petition to the Court in any suit depending therein for an injunction or a Receiver, or to dissolve an injunction, or discharge an order appointing a Receiver, the answer of the defendant shall, for the purpose of evidence on such motion or petition, be regarded merely as an affidavit of the defendant, and affidavits may be received and read in opposition thereto."¹

It will be recollected, that, by the 40th section of the same Act, "Any party may cross-examine any witness, whose affidavit shall have been used by his opponent upon interlocutory application."

The order, when made, usually refers it to the Judge in chambers to appoint a proper person to be the Receiver,² either of the rents and profits of the estate, &c., mentioned in the pleadings, or of the outstanding personal estate and effects of the testator, or of the partnership firm in the pleadings mentioned (as the case may be), and to allow him a proper salary for his care and pains therein.³

But although it is usual to include in the order a direction that the Receiver shall give securities, yet it sometimes happens, that where the parties in the cause name the Receiver, the Court will appoint him upon his own recognizance only,⁴ if all parties can consent.⁵

Notice of motion must be duly served upon the opposite party, and the motion must be supported by affidavits, to establish the

Vialle v. O'Reilly, 1 Hogan, 199; *Osborn v. Heyer*, 2 Paige, 342; *Downshire v. Tyrrell*, Hayes, 354. For the practice in reference to the Master, see *Edwards, Receivers*, 64.

¹ Where the plaintiff uses affidavits, the defendant may also read depositions. *Edwards, Receivers*, 66.

² See *Att'y-Gen. v. Bank of Columbia*, 1 Paige, 511.

³ It should state distinctly the property over which he is appointed receiver; *Crow v. Wood*, 13 Beav. 271.

⁴ But see *Bailie v. Bailie*, 1 Irish Eq. 413.

⁵ *Countess of Carlisle v. Lord Berkley*, Amb. 599; *Ridout v. Earl of Plymouth*, 1 Dick. 68; *Tylee v. Tylee*, 17 Beav. 583.

facts necessary to induce the Court to make the order. When an application is made in chambers to fill up a vacancy in the office of Receiver, a summons must be taken out in the usual form.

Formerly, the order appointing the Receiver proceeded to direct that he should give security, to be approved of by the Master.¹ This direction is now rendered unnecessary by the 13th Order of 16th October, 1852, which directs, that, "Where an order is made directing a Receiver to be appointed, unless otherwise ordered, the person to be appointed is first to give security, to be allowed by the Judge to whose Court the cause is attached, and taken before an officer or agent of the Court in the country, if there shall be occasion, duly to account for what he shall receive on account of the rents and profits for the receipt of which he is to be appointed, at such periods as such Judge shall appoint, and to account for and pay the same as the Court shall direct, or, as the case may be, to be answerable for what he shall receive in respect of the personal estate, for the getting in and collection of which he is to be appointed, and to account for and pay the same as the Court shall direct; and the person so to be appointed is to be allowed a proper salary for his care and pains in receiving such rents and profits, or, as the case may be, to have an allowance made to him in respect of his collecting such personal estate."

The 14th of the same Orders directs, that "The General Orders² of the Court with respect to Receivers should, *mutatis mutandis*, apply to Receivers appointed under orders made after these rules and regulations came into force."

The 15th of the same Orders directs, that "Recognizances which have heretofore been given to the Master of the Rolls or the Senior Master in Ordinary, are hereafter to be given to the Master of the Rolls or the Senior Vice-Chancellor for the time being."

Where a party to the cause is to be proposed as a Receiver, the order ought to contain a direction that the party intended to be proposed, or any of the parties, shall be at liberty to propose himself.³

¹ In the appointment of a receiver, the Court will require him to give security for the faithful discharge of the trust. *Tomlinson v. Ward*, 2 Conn. 396.

² These Orders are 23d of April, 1796; 63d and 64th of April, 1828.

³ See ante, p. 1424, n., but a party to the record cannot be a receiver unless he consents to act without salary. *Ibid.* See *Downshire v. Tyrrell*, *Hayes*, 354.

The plaintiff carries into the Judge's chamber a short proposal for the appointment of a person therein named as Receiver, and of two others as his sureties, and stating the nature and amount of and incumbrances on the property. If any other party object, he may propose another person as Receiver.¹

When the Chief Clerk has decided upon the proposal, the draft of the recognizance to be entered into by the Receiver and his sureties, and of an affidavit of the sufficiency of the sureties, is prepared and engrossed by the plaintiff's solicitor.

The Chief Clerk issues his certificate of the due appointments in the following form, which exhibits the present practice of the Court : —

“ In pursuance of the directions given to me by the Vice-Chancellor —, I hereby certify, that in pursuance of the — in this cause, dated the — day of — 18—, — of —, the person who upon first giving security is by the said — appointed Receiver of the rents and profits of the real estates, *and to collect and get in the outstanding personal estate* of — in the said — named, has given security pursuant to the General Order of this Court, and has entered into a recognizance together with — and — as his sureties, dated the — day of —, which has been approved of by the said Judge, in testimony whereof I have signed an allowance in the margin thereof, and such recognizance has been duly enrolled. And I also certify, that the said Judge has appointed the — day of — next, and the same day in

¹ Where the appointment of a receiver is left to the determination of a Master, it seems that the proper way to bring before the Court the propriety of his selection, is by excepting to his report of approval. *Creuze v. Bishop of London*, 2 Dick. 687; S. C. 2 Bro. C. C. (Perkins's ed.) 253, note (1); *Thorpe v. Thorpe*, 12 Vesey, 317. It may, however, be done by petition. *Wynne v. Lord Newborough*, 15 Vesey, 283; *Matter of Eagle Iron Works*, 8 Paige, 385. The judgment of the Master, however, in the selection of a receiver, is never disturbed by the Court, unless it is shown that the person appointed is improper. *Garland v. Garland*, 2 Vesey jr. 137; *Thomas v. Dawkins*, 3 Bro. C. C. 508; *Matter of Eagle Iron Works*, 8 Paige, 385; *Wilkins v. Williams*, 3 Vesey, 588. The Court will not, in such a discussion, enter into comparisons as to the eligibility of the different persons proposed. *Bowersbank v. Cassidaer*, 3 Vesey, 164; *Thorpe v. Thorpe*, 12 Vesey, 317; *Matter of Eagle Iron Works*, 8 Paige, 385. But where a strong case is made of objection to the individual appointed, the Court will refer it back to the Master to review his report. *Creuze v. Bishop of London*, 2 Bro. C. C. 253; *Wynne v. Lord Newborough*, 15 Vesey, 283; *Smith, Receivers*, 11; *Edwards, Receivers*, 80, 81.

each succeeding year, to be the day on which the said — is annually to cause his account to be delivered into the chambers of the said Judge. And that the said Judge has also appointed the — day of — in every year to be the day on which the said — is to pay the balances appearing due on the accounts so to be delivered in, or such part thereof as shall be certified to be proper to be paid as directed by the said — of the — day of —.

“Dated this — day of —.

“—, Chief Clerk.

“Approved this — day of —, 18—.”

A Receiver appointed by this Court is appointed on behalf of all parties, and not of the plaintiff or of one defendant only;¹ therefore, if any loss arises from deficiency in his accounts, the estate must bear it.² The effect of the appointment, however, is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it,³ and when the party entitled to the estate has been ascertained, the Receiver will be considered as his Receiver.⁴ It is to be observed, however, that where, in consequence of the inability of the vendor of an estate sold under a decree to make out his title, a Receiver had been appointed, the Court thought that the expenses of the Receiver ought not to be borne by the purchaser, and directed that they should be repaid to him out of the fund in Court, together with the costs of the application.⁵

¹ *Davis v. The Duke of Marlborough*, 2 Swanst. 118; *In re Colvin*, 3 Maryland Ch. Decis. 278. This applies to receivers appointed of the estate of an infant during his minority. *Neate v. Pink*, 2 Mae. & Gor. 480.

² *Lord Hutchinson v. Lord Massareene*, 2 B. & B. 55.

³ *Sharp v. Carter*, 3 P. W. 379. See *Tillinghast v. Champlin*, 4 Rhode Is. 173; *In re Colvin*, 3 Maryland Ch. Decis. 278. The appointment of a receiver determines no right, and in no way affects the title to the property; his holding is the holding of the Court for him from whom the possession is taken, and he has no right to ask for a revision of an order removing him, any more than a stranger to the cause. *In re Colvin, supra*; *Ellicott v. Warford*, 4 Maryland, 80; *Field v. Jones*, 11 Georgia, 413.

⁴ *Boehm v. Wood, T. & R.* 345; *Ellicott v. Warford*, 4 Maryland, 80; *In re Colvin*, 3 Maryland Ch. Decis. 278.

⁵ *M'Leod v. Phelps*, Jan. 1838, 962.

It has been already stated,¹ that where sequestrators, upon *mesne* process, are in possession of the lands or tenements in question in the cause, the appointment of a Receiver of the rents and profits will have the effect of discharging the sequestration.²

When a Receiver has been appointed of lands or tenements, it is the duty of any party to the record to deliver up to him the possession of such of the lands or tenements as may happen to be in such party's possession. If, however, the party should refuse to do so, the proper course to compel him is to obtain an order, upon motion, that he may, on or before a given day, deliver up the possession to the Receiver;³ and if upon service of such order⁴ he refuses to deliver up the possession, the plaintiff may sue out a writ of assistance in the manner pointed out in the 1 Will. IV. c. 36, s. 15, Rule 19.⁵ It is to be observed, that the person to enforce the delivery of the possession to the Receiver is the party obtaining the order, and not the Receiver himself.

Where the lands or tenements, or any of them, are not in the actual occupation of the party, the order for the appointment of a Receiver usually contains a direction that the tenants shall attorn to the Receiver, and shall pay their rents in arrear, as well as the growing rents, to such Receiver.⁶ Under this order, application should be made by the Receiver to the tenants to attorn, and if they, or any of them, refuse to do so, the party obtaining the order for the appointment of the Receiver should serve them, or such of them as refuse to attorn, with a copy of the order for the appointment of the Receiver, and the certificate of his appointment. He should also serve them with a notice of motion, that they may be ordered to attorn within four days from the service of the order, or stand committed.⁷

¹ Ante, p. 1077.

² *Heyn v. Heyn*, Jac. 49; *Shaw v. Wright*, 3 Ves. 22; *Atlas Bank v. Nahant Bank*, 23 Pick. 480, 488, 489, 490.

³ *Griffith v. Griffith*, 2 Ves. 401; 82d Order, August, 1841; ante, p. 1058.

⁴ In *Davis v. Duke of Marlborough*, 2 Swanst. 116, the order appointing the receiver directed the Duke of Marlborough to deliver up possession to the receiver.

⁵ Ante, p. 1082.

⁶ *Simmonds v. Lord Kinnaird*, 4 Ves. 747.

⁷ *Reid v. Middleton*, T. & R. 455. It is not the course of the Court to make the tenants pay the costs of this motion. *Hobhouse v. Holcombe*, 2 De G. & Sm. 208.

In *Reid v. Middleton*,¹ which has been before referred to, it appeared that the tenant in possession had not agreed to pay any specific rent, and, in consequence, an order was made that an occupation-rent should be settled, and that the tenant should pay the arrears and future payments of such occupation-rent.

When a Receiver has been appointed, his possession is that of the Court, and any attempt to disturb it without the leave of the Court first obtained, will be a contempt on the part of the person making it.² It was so settled in *Angel v. Smith*,³ where the rule was laid down, both with respect to Receivers and Sequestrators, that their possession is not to be disturbed without leave.⁴ When, therefore, a party is prejudiced by having a Receiver put in his way, the course has either been, to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo*.⁵

The rule that the possession of a Receiver is not to be disturbed, extends even to cases in which he has been appointed expressly *without prejudice* to the rights of persons having prior estates; and the individuals having such prior estates must, if they wish to avail themselves of them, apply to the Court either for liberty to bring an ejectment, or to be examined *pro interesse suo*; ⁶ and this although their right to take possession is clear.⁷ In this respect there is no distinction between possession by a Receiver, and that by sequestrators under a commission of sequestration; ⁸ and a Receiver, appointed over property which is in the possession of another Receiver, ought to obtain the special authority of the

¹ 1 T. & R. 455.

² See *De Groot v. Jay*, 30 Barb. (N. Y.) 483.

³ 9 Ves. 335; and see *Russell v. The East Anglian Railway Company*, 3 Mac. & Gor. 104.

⁴ Where the property is legally and properly in the possession of the receiver, it is the duty of the Court to protect such possession, not only against violence, but also against suits at law. But if the property is in the possession of a third person, under a claim of title, the Court will not protect the officer, who attempts by violence to obtain possession, any further than the law will protect him; his general authority being unquestioned. *Parker v. Browning*, 8 Paige, 388; 2 Story Eq. Jur. § 833 *a*, 833 *b*, and note; *Noe v. Gibson*, 7 Paige, 513.

⁵ *Brooks v. Greathed*, 1 J. & W. 176; *Hawkins v. Gathercole*, 1 Drew. 12.

⁶ See *Bryan v. Cormick*, 1 Cox, 422.

⁷ *Anon.* 6 Ves. 287.

⁸ *Brooks v. Greathed*, 1 J. & W. 178; *Gomme v. West*, 2 Dick. 472.

Court to recover this property;¹ and the Directors of a Railway Company, proceeding under the Lands Clauses Consolidation Act, 1845, were restrained from taking possession of a piece of ground in the possession of a Receiver.²

It may be mentioned here, that where an ejectment was actually brought against a Receiver, although it was without the previous leave of the Court, the Court made a reference to the Master, to inquire whether it would be for the benefit of the parties interested, who were adults, that the Receiver should defend the ejectment and charge the expense in his accounts.³

SECTION IV.

*Salary and Allowances.*⁴

It will be recollected that the General Orders direct that the Receiver is to be allowed a proper salary. The Receiver's salary, however, has not generally been fixed till the passing of the first account, when he is allowed a *per centage* upon his receipts in his discharge, for his care and pains, by way of salary.

The usual allowance to a Receiver of the rents and profits of a landed estate has generally been 5*l.* per cent. on the gross rental; this, however, has been the *maximum*: and where the rental has been very considerable, a *per centage* at a much lower rate has been allowed, or a stated salary sufficient to compensate the Receiver's services.⁵

¹ Ward v. Swift, 6 Hare, 312.

² Tink v. Rundle, 10 Beav. 318.

³ Anon. 6 Ves. 287.

⁴ For a full consideration of this subject, see Edwards, Receivers, 530 *et seq.*; Matter of Kellogg, 7 Paige, 265; Vanderheyden v. Vanderheyden, 2 Paige, 287; Matter of Roberts, 3 John. Ch. 43; Williamson v. Wilson, 1 Bland, 439.

⁵ In Price v. White, 1 Bailey Eq. 240, it was held, that a receiver who discharges the duty assigned to him, is entitled to the usual commissions, although they appear to be more than a reasonable compensation for the services rendered. In some instances they may be more, and in some instances less, than an adequate remuneration; but even this is preferable to the uncertainty of suffering the rate of compensation to depend upon the discretion of the Master. Nor is it any ground for an exception to the general rule, that the business was conducted almost entirely by overseers and factors, inasmuch as the receiver has incurred the responsibilities incident to these sub-agencies.

The subject of per centage proper to be allowed to a Receiver, by way of salary, underwent investigation in the case of *Day v. Croft*; and, in his judgment upon that case, Lord Langdale, M. R., who had inquired what was the practice adopted on this point, thus states the result of his inquiries:—"The Masters have each of them been good enough to furnish me with a certificate; and I find that there is no general rule which universally prevails as to the allowance to a Receiver. Where the receipts consist of rents of freehold and leasehold estates, 5*l.* per cent upon the amount received, is most frequently allowed. If there be any special difficulty in collecting the rents, on account of the sums being extremely small, or of the payments being very frequent, as weekly payments, then the allowance is increased; on the other hand, if there should be very great facility in receiving the rents, then less than 5*l.* per cent is allowed. One of the Masters has certified to me a case where, after consideration, he allowed only 4*l.* per cent for the receipts of rents and profits of freehold and leasehold estates. Another Master has certified to me a case in which the sum paid to the Receiver amounted to 300*l.* a year for the first year; the Receiver was afterwards allowed 150*l.* only for a succession of years, which was afterwards reduced to 50*l.* a year for the receipt of the same rents; it cannot, therefore, be considered as an universal or general rule, that 5*l.* per cent should be allowed even upon the receipts of rents and profits. It may be increased if there be any extraordinary difficulty, or diminished if there be any extraordinary facility in the collection.

"With respect to other receipts, each Master considers himself bound to have regard to the degree of facility or difficulty there may be in receiving them. They have sometimes allowed 2½*l.* per cent, but for gross sums of money this has been very much reduced, and 1½*l.* per cent has been allowed upon many occasions. It appears, therefore, that the Masters, as they ought, consider upon each occasion, what is fit or proper to be allowed, having regard to the degree of difficulty or facility experienced by the Receiver."

A Receiver may be entitled to allowances beyond his salary for any extraordinary trouble or expenses he may have been put to in the performance of his duties.¹ The Court will not, however,

¹ See *Potts v. Leighton*, 15 Ves. 276. See *Williamson v. Wilson*, 1 Bland, 433; *Adams v. Haskell*, 6 Cal. 475. The commissions allowed by law are in-

sanction such allowances, where they are objected to, unless the Receiver has had the previous approbation of the Court or Judge for what he has done.¹

SECTION V.

Powers, Duties, and Liabilities of Receivers.

WHEN a Receiver has been appointed of lands and tenements, his duty is to obtain the possession of such of the estates as may be in the hands of any of the parties to the cause,² and to obtain the attornment of the tenants of such of them as may be let.³ If he is unable to accomplish this, by reason of the refusal of the party to deliver up possession of the estate, or of the tenants to attorn, he must report such refusal to the solicitor of the party on whose application the order for the Receiver was made, in order that he may take the necessary steps to put the Receiver into possession or to procure the attornment of the tenants.⁴

tended to be a full compensation to the receiver for his personal services in the execution of his trust. He is not authorized to act himself as counsel in the business of his trust, so as to entitle himself to extra counsel fees for professional services, beyond the allowances provided in the fee-bill to attorneys, solicitors, &c. *Matter of the Bank of Niagara*, 6 Paige, 213.

¹ *In re Ormsby*, 1 B. & B. 189. *Malcolm v. O'Callaghan*, 3 M. & C. 52; *Bristowe v. Needham*, 2 Phil. 190.

² A receiver is under no obligation to attempt to take property from the possession of a third person, or even from the defendant himself, by force, without an express order of the Court directing him to do so. *Parker v. Browning*, 8 Paige, 388.

³ See 2 Story Eq. Jur. § 833; *Sea Ins. Co. v. Stebbins*, 8 Paige, 565. He has no powers except such as are conferred on him by the order for his appointment, and the course and practice of the Court; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 452; excepting where he is appointed under particular statutes, as in cases of proceedings against corporations, in which, in New York, he is a statutory assignee, vested with nearly all the powers and authority of the assignee of an insolvent debtor. *Ib.*; *Attorney-General v. Life & Fire Ins. Co.* 4 Paige, 224; *Edwards, Receivers*, 4. Persons, appointed receivers or trustees in such cases, hold a power much larger and of a different character from that of ordinary receivers in a Chancery suit. See *Atlas Bank v. Nahant Bank*, 23 Pick. 489; *S. C.* 3 Metcalf, 581.

⁴ As a general rule, a receiver appointed in a cause, should not employ the solicitor of either of the parties in the suit, to assist him in the discharge of his duties as a receiver. *Ryckman v. Parkins*, 5 Paige, 543.

The tenants are bound to pay to the Receiver not only the rents which are accruing at the time of his appointment, but any rents which may be then due and in arrear.¹

A Receiver has power, after the tenants have attorned to him, or have paid him rent, to distrain upon them for rents in arrear. Formerly an order was considered necessary to authorize such a course,² but it seems to be now settled, that if the tenant has attorned, an order is unnecessary to enable a Receiver to distrain,³ unless the rents are more than one year in arrear, in which case an order was formerly considered necessary.⁴

In *Pitt v. Snowden*,⁵ Lord Hardwicke said, that if there should be any doubt who had the legal right to the rents, then the Receiver, as he must distrain in the name of the person who has that right, would very properly make an application to the Court for an order; this, however, cannot apply to cases in which there has been an attornment pursuant to the order, as by such attornment the legal right to the rent is given to the Receiver, who must then distrain in his own name.

It seems that, formerly, it was necessary, before the Receiver could set or let any part of the estate, to have an order to sanction his so doing, which was obtained as of course;⁶ but this power is now always given by the order under which he is appointed.

The 64th Order of 1828 directs, "That in every order directing the appointment of a Receiver of landed estates, there be inserted a direction that such Receiver shall *manage*, as well as let and set, the estate with the approbation of the Master."⁷

As connected with the management of the estates, it is to be mentioned, that although a Receiver has power, in the case of a

¹ *Codrington v. Johnstone*, 1 Beav. 524.

² *Shelly v. Pelham*, 1 Dick. 120; *Mitchel v. Duke of Manchester*, 2 Dick. 787.

³ *Pitt v. Snowden*, 3 Atk. 750; *Raincock v. Simpson*, 1 Dick. 120, (n.); *Hughes v. Hughes*, 1 Ves. jr. 161; 3 Bro. C. C. 87, S. C. (Perkins's ed.) note (1); *Brandon v. Brandon*, 5 Mad. 473.

⁴ *Brandon v. Brandon*, 5 Mad. 473, but since this case the 64th Order of 1828 was issued, see next page; see also *Codrington v. Johnstone*, 1 Beav. 524.

⁵ 3 Atk. 750.

⁶ *Neale v. Bealing*, 3 Swanst. 304 (n).

⁷ This order has been extended to enable the provisions of the Tithe Commutation Act to be carried out, 6 & 7 Will. 4, c. 71, s. 12, and Order March, 1839.

tenant from year to year who has attorned to him, to give him notice to determine his tenancy,¹ he cannot bring an ejectment, or take any other step towards turning him out of possession, without the sanction of the Judge in chambers.²

The Court will not permit a Receiver to lay out more than a very small sum at his own discretion ; it is improper, therefore, for a Receiver, as well as for a guardian, to do any act which may involve the estate in expense, without first applying for sanction in chambers.³ Upon this ground, if an ejectment is brought against a Receiver, or an action for anything done by him in the performance of his duty, he must not attempt to defend it without previously applying for directions ; and in *Swaby v. Dickon*,⁴ where the Receiver, without due sanction, defended actions arising out of a distress made by him upon a tenant of the estate, for rent, the Court refused to allow him his costs of the action.

So, likewise, although a Receiver may lay out small sums of money in customary repairs, or may allow the same to the tenant, the Court is not in the habit of permitting either Receivers or committees to apply the trust funds in repairs, to any considerable extent, without the sanction of the Judge in chambers.⁵

When a Receiver is appointed to get in outstanding personal property, it is his duty to collect all that he can get at ; to enable him to do which, the order, under which his appointment is made, usually directs the parties to deliver up to him all securities in their possession for the outstanding debts and effects, together with all books, papers, and writings relating thereto. If the parties in whose hands such securities or papers are, should refuse to deliver them up, the Receiver should give notice of such refusal to the party obtaining the Receiver, in order that he may take the necessary steps for enforcing the order.

It is to be observed, that, by the terms of the order, the Receiver is empowered, in case it should be necessary to put any of the debts in suit, to make use of the name of the party to whom such debt is legally due.

¹ *Doe v. Read*, 12 East, 59.

² *Wynne v. Lord Newborough*, 1 Ves. jr. 164 ; 3 Bro. C. C. 88, S. C.

³ Under the 64th Order of 1828.

⁴ 5 Sim. 629.

⁵ *Attorney-General v. Vigor*, 11 Ves. 563 ; *Tempest v. Ord*, 2 Mer. 55 ; *Blunt v. Clitherow*, 6 Ves. 799.

A Receiver must not, however, bring any action or commence any suit for the recovery of such debt, without first obtaining the sanction of the Judge in chambers.¹

Where the order directs that the Receiver shall keep down the interest of incumbrances, he must of course comply with that order, taking the necessary receipts upon stamps; and it is to be remembered that, in passing his accounts, the Receiver will be subject to the same rules that all other accounting parties are subject to.²

It may be mentioned in this place, that a Receiver will be responsible for any loss which may be occasioned to the estate from his wilful default; therefore, if he places money received by him in what he knew to be improper hands, the Court will oblige him to pay it out of his own pocket.³ But if where rents received are large, and he, as a necessary precaution, for the purpose of remitting it to London in bills rather than in *specie*, pays it to a tradesman *who is in credit at the time*, and takes bills from him, and the tradesman afterwards fails, he will not be affected.⁴

So, also, if he deposits the moneys with a banker for safe custody, he will not be answerable for the failure of the banker, if the moneys are not mixed with his own moneys, and they were *bonâ*

¹ *Bristowe v. Needham*, 2 Phil. 196. *Ward v. Swift*, 6 Hare, 312; *Swaby v. Dickon*, 5 Sim. 629; 1 Seton Decrees (3d Eng. ed.) 381.

Where the property is in the possession of a third person, who claims the right to retain it, the receiver must either proceed by suit against him, or the plaintiff must make him a party to his suit, and apply to have his receivership extended to the property in his hands, so that an order may be made for its delivery, and may be enforced by process of contempt. *Parker v. Browning*, 8 Paige, 388. A receiver can neither be bound by any implied waiver, nor can he expressly waive any legal technical defence, or abandon an equitable one. *McEvers v. Lawrence*, 1 Hoff. Ch. 172. Nor has a receiver power to dispense with the conditions of a policy. *Ib.* A receiver may maintain an action against the judgment debtor for property converted by him after the receiver's appointment. *Gardner v. Smith*, 29 Barb. (N. Y.) 68. Receivers appointed in another State or country may sue in the Courts of New York. *Runk v. St. John*, 29 Barb. (N. Y.) 585. In an action by a receiver, it is not necessary that he should set out all the proceedings by which he was appointed. *Stewart v. Beebe*, 28 Barb. (N. Y.) 34.

² See ante, p. 1342.

³ *Knight v. Lord Plymouth*, 3 Atk. 480; 1 Dick. 120, S. C.; see, also, *Rowth v. Howell*, 3 Ves. 565.

⁴ *Ibid.*

fide deposited for safe custody under circumstances in which they could not properly have been paid into Court.¹

A Receiver, however, will be held answerable for the loss occasioned by the failure of a banker with whom he deposited moneys for security, if the deposits be made in such a way that he parts with the absolute control over the fund; therefore, where a Receiver paid the sums which he had received into a banking-house, to the joint account of his sureties, under an arrangement with them, that all drafts for the sums so paid in should be written by one of the sureties and signed by himself, it was held by Lord Brougham, and afterwards by the House of Lords upon appeal, that the Receiver was liable to the loss occasioned by the failure of the banking-house.²

The case will be the same if the Receiver deposits the money with, or remits it to, a banker for his own credit and use, and not to a separate account for the trust, and the banker afterwards fails.³

It is the duty of a Receiver to pass his account annually, unless otherwise directed by the order for his appointment, which sometimes, especially in the case of Receivers of personal estate, directs the Receiver to pass his accounts half-yearly.⁴

If a Receiver does not regularly pass his accounts, he is liable to be deprived of his salary, and also to be charged with interest on the balances in his hands.⁵

Lord Eldon directed that a Receiver of the personal estate of a testator not passing his accounts and paying in his balances, should be deprived of his salary. He also directed him to be charged with interest, but not upon each sum, from the moment at which it came into his hands, but in the same manner that an executor is charged with interest, *i. e.* by making yearly or half-yearly *rests* in the account.⁶ And it appears that this rule will be applied as

¹ *Salway v. Salway*, 4 Russ. 60.

² *Salway v. Salway*, 2 R. & M. 215; 9 Blich, N. S. 181, *sub nomine* White *v.* Baugh.

³ *Wren v. Kirton*, 11 Ves. 377. The receiver is bound to keep the property so that it can be easily traced, delivered up, or accounted for. *Williamson v. Wilson*, 1 Bland, 436.

⁴ *Seton on Decrees*.

⁵ See old Orders, 15 December, 1792, and 23d April, 1796; and the observations in *Ward v. Swift*, 8 Hare, 139.

⁶ *Potts v. Leighton*, 15 Ves. 273; see, also, — *v. Jolland*, 8 Ves. 72; *Fletcher v. Dodd*, 1 Ves. jr. 85. Where a receiver improperly retains a balance

well in cases where the Receiver has been discharged as where he is still in office; therefore, where a Receiver who had been discharged had not paid in his balance, he was ordered, upon motion, to pay in the same, and also the amount allowed for his salary, together with interest on both sums, at 5*l.* per cent from the day appointed by the Master, and the costs of the motion.¹

It is to be observed, that, in *Fletcher v. Dodd*,² Lord Loughborough said that he would make a Receiver pay interest, if he keeps money in his hands a quarter of a year after it ought to have been paid into Court.³

In ——— *v. Jolland*,⁴ Lord Eldon appeared to think, that if such a case should be brought before him, he should direct a Receiver to make good any loss which might be occasioned from a difference in the price of the funds between the time when the Receiver's balances were paid in and the time when they ought to have been paid in.

In *Hicks v. Hicks*,⁵ where a Receiver had been appointed during the minority of an infant who had no guardian, and was directed to place out the surplus of the rents and profits when they should amount to a competent sum, on government or other securities, but omitted so to do, Lord Hardwicke directed that he should pay interest at the rate of 4*l.* per cent on the surplus rents and profits, from the date of the decree till the infant came of age, although the infant, two days after he came of age, settled accounts with the Receiver, who delivered up his vouchers, and gave him copies of all the accounts passed by the Master, &c. In that case Lord Hardwicke held, that it was no excuse for the Receiver to say — that the buildings and farms were in a ruinous condition, and the tenants constantly breaking, and that it was

in his hands, and does not regularly pass his accounts, he will have to pay interest on the amount, if the Master should deem it just, unless he can show a special case of exemption. *Harman v. Foster*, 1 Hogan, 318; *In re Carter*, 3 Paige, 146; *In re Seaman*, ib. 409. The Court is strict in requiring compliance with the rule to account. *Edwards, Receivers*, 482. As to charging interest against agents, receivers, trustees, &c., see post, 1452.

¹ *Harrison v. Boydell*, 6 Sim. 211.

² 1 Ves. 85.

³ In *Hooper v. Winston*, 24 Ill. 353, a receiver was ordered to account for interest which he might have earned.

⁴ 8 Ves. 73. The name of this case is *Frotherstone v. Jolland*.

⁵ 3 Atk. 274.

therefore necessary for the Receiver to keep a balance in his hands for rebuilding and repairing, or for stocking empty farms ; because it is not to be supposed that he could in such matters, exhaust the funds received.¹ He also held, that there was no force in the argument derived from the fact of the Master having given no directions for the investment of the money, because "it was the duty of the Receiver to remind the Master to lay out the surplus rents as often as they amounted to a competent sum."² It is to be observed, however, that, in the above case, the infant had no guardian, and that where he has a guardian, if the Receiver accounts with such guardian, he will not be obliged to account over again with the infant when he comes of age.³

It may be remarked in this place, that although a Receiver is only bound, by his recognizance, to pass his accounts yearly, he may at any time apply to the Court to pay in the moneys in his hands, and that if in the interval between passing his accounts he receives sums of such an amount as to make it worth while to lay them out, he ought to apply for an order to have them paid into Court, that they may be then made productive for the benefit of the estate.⁴

SECTION VI.

Of Receivers' Accounts.

If a Receiver does not bring in his account within the time limited for that purpose,⁵ the party desirous of having it brought in may take out a summons for him to bring in his account ;⁶ and, upon default, the party is entitled to an attachment against the Receiver.

¹ 3 Atk. 374.

² Ibid. ; see *Earl of Lonsdale v. Church*, 3 Bro. C. C. 41.

³ *Clavering's Case*, Prec. in Chan. 535 ; 2 Eq. Ca. Ab. 9, c. 7, S. C.

⁴ *Shaw v. Rhodes*, 2 Russ. 539 ; see, also, *Hand's Practice*, p. 183, where an order of this nature may be found.

⁵ Ante, p. 1428 ; and see *Scott v. Platel*, 2 Phil. 229.

⁶ A receiver cannot be compelled to account and show his books to a party in a suit. He is to account to the Court only. *Musgrove v. Nash*, 3 Edw. Ch. 172 ; *Edwards, Receivers*, 506. For a full view of the practice on accounting by a receiver, see *Edwards, Receivers*, 493 *et seq.*, ch. 14.

If the Receiver brings in his accounts, but fails to proceed upon them, the party prosecuting the cause takes out and serves, on the Receiver's solicitor, a summons to proceed on the accounts; if the Receiver does not attend, the Judges' clerk allows the sums where-with he has charged himself, and disallows his payments for want of being vouched.

It is, however, the duty of the Receiver to prepare and carry in his accounts to the Judges' chamber, at the time fixed by the Order.

The 31st Order of 16th October, 1852, directs, that, "Upon a Receiver's account being left in the Judges' chamber to be passed, a summons to proceed thereon is to be taken out; and the account, when passed, is to be entered by the solicitor of the Receiver in books in the same manner as heretofore; but the affidavit verifying the account so passed is to refer to it as an exhibit, and not to be annexed to it."

The Receiver's account is itself carried in without oath. When the account has been passed, it is verified by a separate affidavit, which is filed in the Record and Writ Clerks' Office.

Upon the return of the summons taken out under the last-mentioned Order, the Receiver or his solicitor attends with the other parties entitled to appear, and the account is settled. The costs of the Receiver and of the other parties are also carried in and taxed. The account is then entered in a book kept for that purpose.

By the 32d Order of October, 1852, when the Receivership has been completed, the book containing the accounts is to be deposited in the Record and Writ Office. In the mean time, however, until the Receivership is completed, the account-book is kept by the Master's clerk.

By the 53d Order, the Orders 47, 48, 49 and 51,¹ are not to apply to certificates in passing Receiver's accounts; such certificates may be approved and signed by the Judge without delay, and copies being so signed are to be filed and forthwith acted upon.

The 53d Order of 16th October, 1852, does not preclude the opinion of the Judge being taken upon any item, if the parties think fit.²

¹ Ante, pp. 1253, 1254, 1255.

² *Cowper v. Earl Cowper*, 2 P. Wms. 729.

The balance in the Receiver's hands should be paid into Court as soon as the report is made. For this purpose, the Receiver should apply to the Accountant-General for the usual direction to pay the balance into the Bank, and should produce the order under which his appointment is made, together with the report; the direction for payment of the Receiver's clear balance into the Bank will then be made.

When the order for appointing a Receiver does not provide for the payment of his balances into the Bank, the Receiver will not be allowed to avail himself of the omission, and to keep a balance in his hands without interest, under a pretence of waiting for some party in the cause to obtain an order upon him for payment; he ought, upon his own application, to obtain an order for that purpose, and that the costs thereof may be allowed him in his next account, and, unless he does so, the Court will charge him with interest.¹

The course of proceeding to enforce payment of the balance by a Receiver, is, in the first instance, to move on notice for an order upon the Receiver for payment, of the balance reported due, within a given time.² The order should be drawn up, passed, entered, and served *personally* upon the Receiver. If he absconds, an order must be obtained, that service by leaving the order for payment at his dwelling with one of the family may be substituted.³ If the balance be not paid in according to the order, upon an affidavit of service, a certificate of the Accountant-General of default, an attachment may be obtained.

Where a Receiver dies, the Court has jurisdiction to order, in a summary way, that his recognizances shall be put in suit against his real and personal representatives, and against his sureties, although the balance found due from him in his lifetime be unascertained. It does not, however, appear, whether his personal representative can be called on to account upon proceeding in a summary way.⁴

When the Receiver's recognizances are to be put in suit, an order must first be obtained to authorize it. This order is usually

¹ Potts v. Leighton, 15 Ves. 274. This order should be applied for on notice to the parties in the cause.

² Davies v. Calcraft, 14 Ves. 143.

³ 1 Turn. & V. 470, and ante, p. 1060.

⁴ Ludgater v. Channell, 3 Mac. & Gor. 175.

obtained upon motion, of which notice must be given to the Receiver, and if the sureties are to be proceeded against, notice of the motion must also be served upon them.¹

When the order has been obtained it must be taken to the Petty Bag Office, where the following proceedings will be adopted.²

By the recognizances entered into by Receivers and their sureties, they, the cognizors, acknowledge themselves to be indebted to the cognizees (the Master of the Rolls and the senior Vice-Chancellor) in certain sums of money to be paid on certain days therein mentioned; in default of which they will and agree that the said sums shall be levied and recovered of them, their heirs, executors, and administrators, and of all and singular their lands and hereditaments, goods and chattels; the recognizance, however, is subject to a condition for making it void if the Receiver shall duly account for the rents and profits of the estate of which he is appointed Receiver.

When these recognizances are enrolled they are perfected, and being then acknowledgments of debts upon record, are like judgments at Law, and have been sometimes so called.³ However, though the Receiver makes default in not performing the condition of the recognizance, execution is not to be sued out, nor is the recognizance to be put in suit till the parties interested in the estate have obtained an order of the Court for that purpose.⁴

This being done, the course of proceeding against the cognizees is by *scire facias*, requiring them to show, if they have anything to say, why the cognizee should not have execution.⁵

It may be mentioned, that, in *Walker v. Wild*,⁶ where a Receiver absconded and proceedings were taken upon his recognizance, one of the sureties applied for and obtained an order for a

¹ The precise amount due should be shown; *Ludgater v. Channell*, 15 Sim. 479.

² The author is indebted for the following statement of the proceedings upon a receiver's recognizances, to Mr. Abbot of the Petty Bag Office. See, also, *Curs. Cane.* 500.

³ 2 Bulstr. 62.

⁴ A receiver is an officer of the Court, and permission of the Court is necessary to warrant an action against him. It is a contempt of the Court to sue a receiver without such permission. *De Groot v. Jay*, 30 Barb. (N. Y.) 483.

⁵ It appears that when the receiver is dead, these recognizances may be put in suit against the receiver's real and personal representatives or sureties. *Ludgater v. Channell*, 15 Sim. 477.

⁶ 1 Mad. 528.

reference, to see what was due from the Receiver, and that he (the surety) might be at liberty to pay in the amount by instalments, so as such amount did not exceed the recognizance, and for a stay of the proceedings in the mean time, and that the Court made the order, upon the surety paying the costs of the motion and of the subsequent proceedings in consequence of it.

It is to be noticed, that, if there is any proceeding at Law upon the recognizance, the penalty of the recognizance is the debt for which the execution will be issued.¹

It may be mentioned here, that if the surety of a Receiver has paid anything on his account, for the benefit of the estate, he is entitled to be indemnified out of the balance due to the Receiver.²

When a Receiver has been appointed, and has given security, he cannot be discharged upon his own application, without showing some reasonable cause, by affidavit, why he should put the parties to the expense of a change.³

An instance of a Receiver being discharged on his own application (on the ground of ill health) may be found in *Richardson v. Ward*,⁴ in which case he was not only discharged and his recognizance ordered to be vacated, but he was allowed, although this part of the application was opposed, to retain his costs "of the application, and incidental thereto," out of the balance in his hands.

A Receiver is generally continued till the decree, but if the right of the plaintiff ceases before that time, the Receiver may be discharged, and cannot be continued at the instance of a defendant.⁵

In a case, in which a Receiver had been appointed in a suit for the removal of trustees, and the appointment of new ones, upon the ground of misconduct on the part of one, and of age and infirmity on the part of the other, upon new trustees being appointed, in pursuance of the decree, an application was made on the

¹ See the certificate of the Judge of K. B., in *Dawson v. Raynes*, 2 Russ. 466 – 468.

² *Glossup v. Harrison*, 3 V. & B. 134; Coop. 61, S. C.

³ 2 Harr. (ed. Newl.) 503. On a final and full account, a receiver, or his representatives, may be discharged and his bond cancelled. *Williamson v. Wilson*, 1 Bland, 439.

⁴ *Mad. & Geld.* 266.

⁵ *Davis v. Duke of Marlborough*, 2 Swanst. 108 – 168; *Largau v. Bowen*, 1 Sch. & Lef. 296.

part of the plaintiff to discharge the Receiver, on the ground that the new trustees were willing to act; and Lord Langdale made the order, although it was opposed by some of the defendants, who were beneficially interested in the property as legatees, upon the trustees undertaking, without entering into recognizances, to account half-yearly, in the same way as the Receiver.¹

The appointment of a Receiver, made previous to a decree, will be superseded by it, unless the Receiver is expressly continued.² A Receiver, however, is never discharged by decree; but the application for his discharge is usually made by motion, notice whereof should be served on all parties, and the order runs thus, "That the Receiver be discharged from being such Receiver, and that he do forthwith³ pass his final account, and pay the balance reported due into the Bank, or to the person entitled to receive it." Upon the Receiver's solicitor leaving the order, and the Accountant-General's certificate of the balance being paid in by the Receiver, or the affidavit of the payment of the balance to the party entitled with the Clerk of Enrolments, he will attend the Master of the Rolls, and get the recognizance vacated, a note whereof will be signed by his secretary on the margin of the order.⁴ Care should be taken that the recognizance be vacated, otherwise if a material error should afterwards be discovered in the Receiver's account, the money may be recovered.

The sureties of a Receiver cannot be discharged at their own request; where, therefore, an application was made to discharge a Receiver on the ground of misconduct, and the sureties joined in the application, Lord Hardwicke held, that no regard was to be had to their application, unless it was for the benefit of the parties in the cause, or something of that kind — "for if people voluntarily make themselves bail or sureties for another, they know the terms, and will be held very hard to their recognizance, and not discharged at their request to have new sureties appointed, for then there would be no end of it."⁵

But although the general rule is not to discharge the surety of a Receiver on his own application during the continuance of the

¹ *Bainbridge v. Blair*, 3 Beav. 422.

² See *Gibson v. Lord Montfort*, 2 Seton on Decrees (3d Eng. ed.) 1003.

³ *Gilbert v. Whitmarsh*, 24th Feb. 1818, *coram* Leach, V. C., 2 Mad. Ch. Pr. 298, ed. 1837.

⁴ *Ex relatione* Mr. Rogers, of the Registrar's Office.

⁵ *Griffith v. Griffith*, 2 Ves. 400; see *Gordon v. Calvert*, 2 Sim. 253.

Receivership, such rule will yield to circumstances, — “as where underhand practice is proved, and the person secured shown to be connected with such practice.”¹

It seems that where a surety does procure his discharge during the continuance of the Receivership, the Receiver must enter into a fresh recognizance.²

With respect to the amount of a surety's liability, there seems to be little doubt but that it extends to all that the Receiver would have been required to pay.³ This point came before Lord Eldon, upon the question whether the sureties of a Receiver were liable to pay interest upon the balance in a Receiver's hands when he became bankrupt, and his Lordship said — “It seems to me that it would be difficult to say that, where the principal debtor would be obliged to pay interest, there would not be an equity that the surety should pay interest in default of the principal. The penalty is forfeited by the breach of the condition ; the amount of a penalty is the debt due from the sureties at Law. How can they have a right to be discharged, in this Court, from their legal liability, till they have paid all that the principal could have been required to pay ? ”⁴

This rule, however, is capable of relaxation where the circumstances of the case will warrant it ; accordingly, as the Receiver in the case referred to, had been bankrupt with the knowledge of all parties for a considerable time, and no steps had been taken to compel the passing his accounts, Lord Eldon refused to make the sureties pay interest.⁵

It seems that, where a Receiver has become bankrupt and the sureties are likely to be called upon to pay the balance due from him, liberty will be given to them to attend the passing of the Receiver's account.⁶

When an action is brought against a Receiver's surety upon the recognizance, the proper course for him to pursue appears to be, to apply to the Court, by motion, to stay the proceedings on the recognizance, offering at the same time to pay the amount due from the Receiver, so as the same does not exceed the amount of

¹ Hamilton v. Brewster, 2 Mol. 407.

² Vaughan v. Vaughan, 1 Dick. 90 ; Blois v. Blois, ib. 337.

³ Dawson v. Raynes, 2 Russ. 6.

⁴ Ibid.

⁵ Dawson v. Raynes, 2 Russ. *ubi supra*.

⁶ Ibid. 467.

the recognizance, into Court ; and, upon such motion, the order will be made upon the surety's paying the cost of the application, and of the proceedings consequent upon it.

When the Receiver's account has not been taken, the motion should also pray a reference to the Master to see what is due from the Receiver ; and it seems that, upon such application, the Court will indulge the surety by allowing him to pay the balance in by instalments.¹

When a surety is called upon to pay anything on account of the Receiver, he will be entitled to stand in the place of the Receiver for anything which may be coming to him in the suit ; therefore, where the Receiver of the Opera-House had borrowed money from his surety to enable him to make the necessary payments to the tradesmen and others connected with the theatre, Lord Eldon decided, that the surety was entitled to be repaid the amount lent, out of the balance in Court reported due to the Receiver.²

In conclusion, it may be mentioned that the term manager or consignee, as distinguished from a Receiver, is sometimes used with respect to certain descriptions of property, as mines, collieries or West India estates. There does not seem to be any substantial difference in the practice with respect to officers thus designated, and by the interpretation clause of the Orders of 16th October, 1852, "The word 'Receiver' includes consignee and manager."³

¹ Walker *v.* Wild, 1 Mad. 528.

² Glossup *v.* Harrison, Coop. 61 ; 3 V. & B. 134.

³ See Brenan *v.* Preston, 2 De G., Mac. & Gor. 815.

CHAPTER XXIX.

ON FURTHER DIRECTIONS, AND THE FURTHER CONSIDERATION OF CAUSES.

PREVIOUS to the recent changes in practice, arising out of the Chancery Amendment Act, and the Act for the Abolition of the office of Master, the first decree, in almost every cause, was in its nature interlocutory, and the consideration of further directions was reserved until after the trial of an issue, the decision upon a case, or until the Master had made his report. When the issue had been tried, the case decided, or the report made, the cause was set down for further directions, and this process was repeated as often as any further directions were reserved by the decree. If, as was usual, the question of costs was reserved, as well as of further directions, the cause was then set down, as well upon the matter of costs as upon further directions.

Under the modern practice, a cause is continuously before the same Judge; and when an inquiry is directed, the hearing is simply adjourned until after the inquiry has been made, when it is set down for further consideration.

By a General Order of the 4th of March, 1853, "When any cause shall at the original or any subsequent hearing thereof have been adjourned for further consideration, such cause may, after the expiration of eight days, and within fourteen days from the filing of the certificate of the chief clerk of the Judge to whose Court the cause is attached, be set down by the Registrar in the cause-book for further consideration, on the written request of the solicitor for the plaintiff or party having the conduct of the cause."

Moreover, by the same Orders, "After the expiration of fourteen days, the cause may be set down by the Registrar upon the written request either of the solicitor of the plaintiff or of the solicitor of any other party. The following form of request is given in the schedule to the Order:—

"In Chancery.

"A. v. B.

"I request that this cause, the further consideration whereof was adjourned by the Order of the — day of —,

may be set down for further consideration before his Honor the —.

“Dated, &c.

“C. D.,

“Solicitor for the plaintiff.”

On the production of the office-copy of the certificate, or a written request in the above form, the cause will be set down by the Registrar or his clerk.

The same Order provides, “That the cause when so set down shall not be put into the paper for further consideration until after the expiration of ten days from the day on which the same was so set down, and should be numbered in the cause-book accordingly. And notice thereof should be given to the other parties in the cause at least six days before the day for which the same may be so marked for further consideration; and such notice may be in the form or to the effect following; (that is to say),

“In Chancery.

“A. v. B.

“Take notice, that this cause, the further consideration whereof was adjourned by the Order of the — day of —, may, on the — day of —, be set down for further consideration before his Honor the —, for the — day of —.

“C. D.,

“Solicitor for the plaintiff.”

Formerly, when at the first hearing further directions were reserved, the Court usually also reserved in terms the costs of the suitor. It is not usual now expressly to reserve the consideration of costs, as upon the subsequent hearing the whole matter is before the Court. Wherever costs are given by the first decree, it would appear that, unless it is expressly stated that the costs so given are up to the decree, the effect is, that costs subsequent to the decree are included.¹ We have seen² that it is usual for the Court to give liberty to apply to the parties by the decree, when their position and circumstances are such that a final decree cannot with respect to any of them be, at the time of the decree, carried into effect; but the Court, as a general rule, does not at the hearing, when the further consideration of the cause is adjourned, give

¹ *Quarrell v. Beckford*, 1 Mad. 286; *Chilton v. Pardoe*, Turn. 304; and see 1 *Seton on Decrees* (3d Eng. ed.) 57.

² *Ante*, p. 1014.

liberty to that effect. Applications, however, for collateral matters, such as the appointment of a Receiver, have been permitted under the old practice,¹ and probably would not be refused under the present system. Moreover, the Court has also, upon consent, permitted a bill to be dismissed pending a reference, without requiring the cause to be set down on further directions.²

At the hearing of the cause for further consideration, the Court will make such general decree as appears to be consistent with the justice of the case, as it stands upon the decree and certificate.

It is to be remarked, that, where a question has been raised upon the pleadings, but no direction or reservation of it has been given with respect to it by the decree, the Court will not take it into consideration upon a further hearing;³ thus, under the old practice, where, in a suit for the specific performance of an agreement for the sale of a copyhold estate, the defendant insisted by his answer that he was not bound to perform his contract, unless it could be shown that the copyholders of the manor were entitled to dig marl and brick earth on the lands holden by them, and the original decree merely directed the usual reference as to title, the Court, on the hearing upon further directions, refused to direct a reference to inquire whether the copyholders of the manor were entitled to dig marl and brick earth, upon the ground that, as the point was raised by the answer, if the Court had thought it necessary to inquire into the fact, a direction to that effect would have been contained in the original decree, and that, to grant the prayer of the petition, would be to alter, entirely, the decree made at the original hearing, which it is not competent for the Court to do at the hearing on further directions.⁴

In fact, the Court will not alter a decree without a rehearing.⁵ unless in the case of an information relating to a charity, in which case the Court has corrected omissions of the original decree upon further directions.⁶ This practice continues, and, as a general

¹ *Cooke v. Gwyn*, 3 Atk. 689.

² *Anon.* 11 Ves. 169; and see *Jewin v. Taylor*, 6 Beav. 120.

³ The principle is settled, that Chancery will not, on further directions, decide a question not reserved by the original decree. *Lee v. Pindle*, 12 Gill & J. 288.

⁴ *Le Grand v. Whitehead*, 1 Russ. 309; and see *Morgan v. Morgan*, 13 Beav. 441.

⁵ *Lord Shipbrooke v. Lord Hinchinbrooke*, 13 Ves. 387-394.

⁶ *Attorney-General v. Whiteley*, 11 Ves. 241.

rule, the Court will not, upon the hearing for further consideration, alter the original decree, or direct that which is inconsistent with it.¹

It was formerly frequently a question, whether a direction could be given at a hearing upon further directions for the computation of interest, where the question of interest had not been reserved by the original decree.² This question has now become of no practical consequence in general, as by General Orders, without special directions in a decree, interest is allowed upon debts and legacies.

Cases, however, may still occur, where the Court finds by the report or certificate large sums of money in the hands of an agent, receiver, trustee, or personal representative, and it would appear that the Court will still, upon a further hearing, direct the balances from time to time in the hands of the accounting party to be ascertained, and interest to be computed on them.³ And

¹ But when a cause comes on for a hearing, on exceptions to a Master's report, and for directions for a final decree, it is not irregular for a Judge to reverse his decision, under which the reference was made, and dismiss the bill, if he thinks it ought to be dismissed. He is not obliged to enter a final decree which he believes to be erroneous. *Fourniquet v. Perkins*, 16 How. U. S. 84. See *Topp v. Pollard*, 24 Miss. 682.

² *Ryves v. Coleman*, 2 Atk. 440; *Champ v. Wood*, 2 Ves. 474; *Hearle v. Greenbank*, 1 Dick. 370; *Goodyere v. Lake*, Amb. 584; S. C., 1 West, 490; *Sammes v. Rickman*, 2 Ves. jr. 36; *Crenze v. Hunter*, 4 Bro. C. C. 318; S. C., 2 Ves. jr. 164; *Lee v. Pindle*, 12 Gill & J. 288.

³ *Pearse v. Green*, 1 Jac. & W. 135. As to the practice of allowing rests and compound interest against trustees, &c. see *Fay v. Howe*, 1 Pick. 527, (2d ed.) 528, and cases cited in note (1); *Boynton v. Dyer*, 18 Pick. 1; *Hughes v. Smith*, 2 Dana, 253; *Karr v. Karr*, 6 Dana, 3; *Hodge v. Hawkins*, 2 Dev. & Bat. 566; *Ringgold v. Ringgold*, 1 Harr. & Gill, 11; *Diffenderffer v. Winder*, 3 Harr. & Gill, 311; *Harland's Accounts*, 5 Rawle, 323; *Myers v. Myers*, 2 M'Cord. Ch. 214, 266; *Wright v. Wright*, 2 M'Cord, Ch. 202. Trustees, executors, guardians, &c., will in cases of gross delinquency be charged with compound interest. See the cases cited above, and 2 Kent, (11th ed.) 231, note, in which this subject is considered, and the cases cited; *Schieffelin v. Stewart*, 1 John. Ch. 620; *Diffenderffer v. Winder*, 3 Harr. & Gill, 311; 2 Story Eq. Jur. 1277; *Clarkson v. Depeyster*, 1 Hopk. 424; *Rogers v. Rogers*, ib. 515; *Dornford v. Dornford*, 12 Sumner's Vesey, 127, note (a); *Evartson v. Tappan*, 5 John. Ch. 497. Where a trustee has employed the trust money in trade, and refuses to account, he will be charged with compound interest. *Schieffelin v. Stewart*, 1 John. Ch. 620. See *Myers v. Myers*, 2 M'Cord, 214, 266; *Diffenderffer v. Winder*, 3 Harr. & Gill, 311. Where interest was ordered to be paid annually for maintenance and education, interest was allowed on the annual arrears of interest. *Myers v.*

the Court has even gone the length, on further directions, of charging an accounting party with interest on the balance in his hands, not only where there was no reservation of the question of interest by the original decree, but even where the original bill did not pray that they might be so charged.

This was done in the case of executors, in *Turner v. Turner*;¹ and, in *Pearse v. Green*, where an agent appeared, by the Master's report, to have had large sums of money in hand, the Master of the Rolls referred it back to ascertain the balances in the agent's hands, and to compute interest upon them. It is to be observed, that, in the above-cited case of *Turner v. Turner*, the direction to compute interest, notwithstanding there was none prayed by the bill, was founded on the circumstance that, at the time the bill was filed, there did not appear to have been any money in the hands of the executors, and that the balances arose subsequently to the institution of the suit, and, therefore, could not be adverted to in the original bill.

From the above cases it might be inferred, that it is in those cases only, in which the circumstances were such, at the time of filing the bill, that a claim for interest did not or could not be known to exist, that the Court will, upon further directions, make an order to compute interest upon balances, although there is no prayer for interest in the bill; this, however, does not appear to be the case, as, both in *Pearse v. Green*,² and in *Good v. Blewitt*, there cited, the bills were filed for the express purpose of enforcing an account and payment of balances, and decrees for interest were made, although no interest appears to have been prayed, nor was the consideration of it reserved.

It is to be remarked, that it is only in cases where it has appeared from the report, that there is an equitable right to charge an accounting party with interest, (as where an agent, or trustee, or personal representative, has, for a long time, had a considerable sum of money in his hands, belonging to the parties in the suit,) that the Court directs a computation of interest when it has not been reserved by the original decree; where this does not appear *Myers*, 2 M'Cord Ch. 214, 266; *Bowles v. Drayton*, 1 Desaus. 489; *Wright v. Wright*, 2 M'Cord Ch. 202; *Spack v. Long*, 1 Ired. Eq. 426. As to charging the executors and trustees with interest, see farther, *Newton v. Bennett*, 1 Bro. C. C. (Perkins's ed.) 361, 362, notes.

¹ 1 Jac. & W. 43; and see *Wilson v. Metcalfe*, 1 Russ. 533.

² 1 Jac. & W. 135; and see *Hollingsworth v. Shakeshaft*, 14 Beav. 192; *Goodwin v. Clewes*, 2 Beav. 30.

by the report, the Court has no foundation upon which to make such a direction.¹

The Court will not, however, on further consideration, charge executors with wilful default. Thus, in the case of *Garland v. Littlewood*,² where the original decree contained no declaration or inquiry as to wilful default on the part of the defendants who were executors and trustees, Lord Langdale, M. R., refused at the hearing, upon further directions, to make any order charging them with wilful default, or to direct an inquiry upon the subject, notwithstanding the report laid a foundation for such an inquiry. Neither will such an order be made upon a qualified admission by the defendant.³

Although a Receiver has been refused upon the hearing of the cause, yet if, upon the report, a new state of facts appears, *e. g.*, a balance in the hands of the defendant, the Court will entertain a renewed application for a Receiver.⁴

As a general rule, it may be stated that the Court will not (even upon a new state of circumstances appearing by the report.) make any order, upon further directions, which will have the effect of varying or impugning the original decree, and therefore, where a prior decree had ordered the costs of a mortgagee to be taxed, it was held upon further directions, that he would be entitled to be paid those costs, although it appeared, by the report, that he was paid off before the commencement of the suit, and that he had set up an improper defence.⁵

Upon the same ground, when costs of a party have, at the hearing, been ordered to be taxed as between solicitor and client, the Court will, at the hearing upon further directions, direct the subsequent costs of the same party to be taxed upon the same principle. It will not, however, consider itself bound by a previous direction to tax costs, as between solicitor and client, made upon petition and by consent, where, upon further directions, it appears that there is no case to warrant such a mode of taxation.⁶

As the Court will not allow any variation to be made in the

¹ *Parnell v. Price*, 14 Ves. 502.

² 1 Beav. 527; *Cooper v. Carter*, 2 De G., Mac. & Gor. 292; *Green v. Radley*, 2 Beav. 294; *Jones v. Morrall*, 2 Sim., N. S., 241.

³ *Pelham v. Hilder*, 1 Y. & C. C. C. 3.

⁴ *Attorney-General v. The Mayor of Galway*, 1 Moll. 95.

⁵ *Wilson v. Metcalfe*, 1 Russ. 530.

⁶ *Trezevant v. Fraser*, Rolls, Aug. 839.

original decree upon the hearing of the cause for further directions, so it will refuse to entertain an objection to it on the ground which might have been made at the original hearing.¹

When the cause comes on for further consideration, if there has been a sale of the estates, and the purchase-money in Court is to be distributed, the plaintiff's solicitor should serve the purchaser with a notice that the cause is coming on for further consideration, and that the purchase-money will be disposed of under the direction of the Court.² So, also, if any person has obtained what is ordinarily termed a stop order, *i. e.*, an order that a fund in Court or some part of it should not be paid out without notice to the individual obtaining the order, a similar notice should be served upon the person by whom the order was procured.

The course of proceedings upon the hearing of a cause upon further directions, is much the same as that pursued upon the original hearing, except that the pleadings are not opened. Formerly no evidence was admissible, except what had been entered in the decree and in the report, and it was necessary to present a petition for the purpose of obtaining any order or direction that required additional proof.

But now by the 13 & 14 Vict. c. 35, s. 28, "The Court may at the hearing of any cause, or of any further directions therein, receive proof by affidavit of all proper parties being before the Court, and of all such matters as are necessary to be proved for enabling the said Court to order payment of any moneys belonging to any married woman, and of all such other matters not directly at issue in the cause as in the opinion of the said Court may safely and properly be so proved."

Evidence may therefore be now given in support of such facts as might formerly be established by a petition, supported by affidavits, coming on with the decree on further directions.

Thus, if a tenant for life of the fund in Court had died since the decree, and the fund had become distributable amongst those in remainder, a petition might have been presented to the Court stating the facts of the death of the tenant for life, and praying the Court to make distribution amongst the parties who have become entitled upon that event. So also, if after the report, a person entitled to a debt or legacy out of the fund in the suit had

¹ Pritchard *v.* Draper, 1 R. & M. 191.

² 2 Smith, 421, 3d edition.

died, his personal representative might have presented a petition, praying that the debt or legacy belonging to the deceased party might be paid to him. In like manner, if, pending the suit, a party to it had assigned his interest in the fund, either absolutely or by way of mortgage, the assignee might have petitioned the Court, at the same time the cause came on upon further directions, that he might have the benefit of his assignment, and that payment might be made to him instead of the assignor. In all such cases, if the facts which formed the ground of the application were not admitted by all the parties interested, or if all or any of the parties interested were not competent to make an admission, they were stated in the petition and verified by affidavit.¹ And now it would appear, that, in all such cases, affidavits may be adduced in support of an order or direction, without a petition.

An order made upon further directions is, in fact, a decree of the Court, and is drawn up, passed, entered, and enforced, in the manner pointed out in a preceding Chapter.

CHAPTER XXX.

OF COSTS AND FEES.

SECTION I.—*Of Costs in General.*

It is the usual practice of the Court, where, upon the hearing, it adjourns the cause, not to give any directions upon the subject of costs till the further hearing.² In this respect the Court of Chancery, to a certain extent, acts upon the rule adopted by Courts of Law, that *unica directio fiat damnorum*, and which, therefore, give no costs, except upon interlocutory applications, until the final judgment. Courts of Equity, however, do not, in all cases, consider themselves bound by this rule, and they frequently give costs in intermediate stages of the cause, without waiting for the final decree. In fact the giving of costs in equity is entirely discretionary,³ as well with respect to the period at

¹ *Nicholson v. Haines*, 1 Col. 196.

² See *Scarborough v. Burton*, 2 Atk. 111.

³ *Ibid.*; *Bennet v. College*, 3 Bro. C. C. 390. See *Saunders v. Frost*, 5 Pick.

which the Court decides upon them, as with respect to the parties to whom they are given.

When it is said that the giving of costs in Courts of Equity is entirely discretionary, it must not be supposed that these Courts are not governed by definite principles in their decisions relative to the costs of proceedings before them ; all that is meant by the *dictum* is, that these Courts are not like Courts of Common Law, held inflexibly to the rule of giving the costs of the suit to the successful party, but that they will, in awarding costs, take into their consideration the circumstances of the particular case before it, or the situation or conduct of the parties, and exercise their discretion with reference to those points. In exercising this discretion, however, Courts of Equity are generally governed by certain fixed principles which they have adopted upon the subject of costs, and do not, as is frequently supposed, act upon the mere caprice of the Judge before whom the cause happens to be tried.¹

Another difference between the Courts of Law and Courts of Equity with respect to costs, frequently arises from the nature of the property over which Courts of Equity are called upon to exercise their jurisdiction. A large proportion of suits in Equity are instituted for the purpose of obtaining the administration of the property of deceased persons, and, in cases of that description, the habit of the Court is, not to direct the costs of the proceedings to be paid by one party to another, but to order the payment of them to be made out of the estate. The Court will also, for the purpose of affording due protection to trustees or others concerned in the

271 ; *Clark v. Reed*, 11 Pick. 449 ; *Temple v. Lawson*, 19 Ark. 148. And not the subject of Error. *Cowles v. Whitman*, 10 Conn. 121.

¹ *Brooks v. Byam*, 2 Story C. C. 553, 554 ; *Gray v. Gray*, 15 Alabama, 779 ; *Coleman v. Moore*, 3 Litt. 355 ; *Tomlinson v. Ward*, 2 Conn. 396. Costs do not always follow a decree in favor of a party, even of one praying relief, but rest in the discretion of the Court, and are to be awarded or refused, according to the justice of each particular case. *Kaye v. Bank of Louisville*, 9 Dana, 261, 264 ; *Tomlinson v. Ward*, 2 Conn. 396 ; *Hunt v. Lewin*, 4 Stew. & Port. 138 ; *Randolph v. Rosser*, 7 Porter, 249 ; *Travis v. Waters*, 12 John. 500 ; *Meth. Epis. Church v. Jacques*, 1 John. Ch. 65 ; *ib.* 166 ; *Cowles v. Whitman*, 10 Conn. 121 ; *Coleman v. Moore*, 3 Litt. 355. But see *Hightower v. Smith*, 5 J. J. Marsh. 542, 544 ; *Burgh v. Kenny*, 1 Irish Eq. 264. And inasmuch as costs in Chancery do not necessarily follow a decree, there must not only be a decree in favor of a party, but there must also be an express order or decree for his costs, or they are lost. *Connable v. Bucklin*, 2 Aik. 221. See *Travis v. Waters*, 12 John. 500 ; S. C. 1 John. Ch. 85.

administration of trust property, order the costs they have been put to, to be paid out of the fund which is the subject of litigation. In considering the subject of costs, therefore, I shall direct the attention of the reader, 1st, To the rules upon which the Court acts in awarding the costs of a suit to be paid by one party to another: 2dly, To the rules which regulate their determination with regard to the payment of costs out of the fund.

The Court of Chancery also makes a distinction, with regard to the principle upon which the officer of the Court is to proceed in the taxation of costs, by allowing a larger proportion of actual expenditure to parties holding particular characters, than they allow in ordinary circumstances. This distinction is marked by the terms of costs "*as between party and party*," which are the ordinary costs allowed by the Court, and costs "*as between solicitor and client*," which are the costs allowed by the Court to parties filling the characters alluded to; a third section, therefore, will be devoted to the consideration of the principles of taxation, for the purpose of pointing out those cases in which the Court allows of the taxation of costs, upon a more extended scale than the usual scale of taxation between party and party; after which I shall consider, 4thly, The method of taxation and the course to be adopted to bring the determination of questions relating to the taxation before the Court; 5thly, The course to be adopted for enforcing the payment of the costs when taxed; 6thly, The several fees to be paid at different stages of the cause to the officers of the Court.

In treating of the subject of costs in this place, the attention of the reader will be directed to the costs only of the general proceedings in the suit, that is, to those costs which are technically termed "*costs in the cause*," the rules with regard to the costs of interlocutory proceedings and other incidental matters will generally be found upon referring to those parts of the treatise which have been appropriated to the consideration of those matters.

It may be observed, however, that, with respect to the costs of interlocutory proceedings, certain rules exist with regard to their being or not being "*costs in the cause*," and that those costs which do not come within the definition of "*costs in the cause*," under these rules, cannot be obtained as such without the special direction of the Court. What costs of interlocutory applications

by motion are to be considered as "costs in the cause," may be collected from the following rules.¹ These rules, which apply when no special direction is given, are as follows:—

1st. That the party making a successful motion is entitled to his costs as "costs in the cause," but the party opposing it is not entitled to his costs as "costs in the cause."²

2d. That the party making a motion which fails is not entitled to his costs as "costs in the cause," but the party opposing it is entitled to his costs as "costs in the cause."³

3d. That where a motion is made by one party and not opposed by the other, the costs of both parties are "costs in the cause."⁴

Whenever, therefore, by reason of special circumstances, it was not the intention of the Court that these rules should apply, particular directions with respect to the costs must be given.

It may be convenient to mention here, that the 123d Order of May, 1845, has directed that, "Upon interlocutory applications where the Court deems it proper to award costs to either party, the Court may, by the order, direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross is to be paid."

The costs of an abandoned motion are not costs in the cause, and therefore, where a party gave notice of a motion and died before the motion was heard, they were disallowed the costs of the abandoned motion, though the suit was revived by the executors.⁵

It has always been the rule that, upon the question of costs, a defendant in Equity has the advantage of appealing to his own answer, and that, although such answer cannot be read as evidence on his own behalf, upon the matter in dispute between him

¹ Memorandum, 1 S. & S. 357.

² Ibid. *Stafford v. Bryan*, 2 Paige, 45; Halst. Dig. 176. If the object of the motion be in the nature of an indulgence to the party applying, he will pay the costs, although the motion is granted — [*Browne v. Lockhart*, 10 Sim. 420]; and the rule appears to be qualified in the case of injunction suits, according to the decision of the Chancellor in *Stevens v. Keating*, 1 Mac. & Gor. 659.

³ Ibid; see, also, *White v. Lisle*, 4 Mad. 226. The rule applies to motions to obtain or to dissolve an injunction. *Marsack v. Reeves*, Mad. & Geld. 108; *Stafford v. Bryan*, 2 Paige, 45. Where a party successfully opposes a motion and nothing is said about costs in the order denying the application, he is entitled to his costs of opposing as costs in the cause, if he obtains a decree for costs. *Rogers v. Rogers*, 2 Paige, 299. See *Wilkinson v. Henshaw*, 4 Paige, 257.

⁴ 1 S. & S. 357.

⁵ *Lewis v. Armstrong*, 3 M. & K. 69.

and the plaintiff, the Court will, before it decides upon the question of costs, look into the answer, and act upon the representations it contains,¹ and it will frequently, although compelled, by the evidence read in the cause, to decree against a defendant, give credit to his own statement, contained in his answer upon oath, as to his conduct, and make the decree against him without costs.² The same practice also extends to the answers of peers,³ although they are put in upon honor only and not upon oath.⁴

This rule, however, was of much more consequence before the recent changes in the rules of evidence, by means of which a defendant is now enabled to obtain the benefit of his own testimony in his own case.

SECTION II.

Of Costs from one Party to another.

It was the rule of the Civil Law, that *victus victori in expensis condemnatus est*,⁵ and this is the general rule adopted in the Court of Chancery, as well as in Courts of Law, at least to the extent of throwing it upon the failing party to show the existence of circumstances to displace the *primâ facie* claim to costs given by success to the party who prevails.⁶

¹ *Vancouver v. Bliss*, 11 Ves. 458; *Howell v. George*, 1 Mad. 1.

² See *Millington v. Fox*, 3 M. & C. 338.

³ *Dawson v. Ellis*, 1 J. & W. 524.

⁴ Ante, p. 746.

⁵ Cod. 3, 1, 13.

⁶ *Vancouver v. Bliss*, 11 Ves. 463; *Staines v. Morris*, 1 V. & B. 8, 15; *Millington v. Fox*, 3 M. & C. 338, 358; *Colburn v. Sim*, 2 Hare, 543. As a general rule, the prevailing party is *primâ facie* entitled to costs, as well in a Court of Equity, as at Law; but the Court may, in its discretion, award costs to either party. *Saunders v. Frost*, 5 Pick. 260, 271; *Clark v. Reed*, 11 Pick. 446, 449; *Bryant v. Russell*, 23 Pick. 508; *Tomlinson v. Ward*, 2 Conn. 396; *Lee v. Pindle*, 12 Gill & J. 288; *Brooks v. Byam*, 2 Story C. C. 553; *Eastburn v. Kirk*, 2 John. Ch. 317; *Frisby v. Balance*, 4 Scam. 287; *Burton v. Fort*, 18 Ark. 202; *Perkins v. McGavock*, 3 Hey. 255; *White v. Walker*, 5 Florida, 478. And when a creditor recovers a debt in the Court of Chancery, he recovers costs also, unless special and strong reasons to the contrary intervene. And those costs, in general, are the costs of the whole litigation; although the creditor may have failed as to part

If, however, the failing party can show to the Court any circumstances which may satisfy it that it would be against the ordinary principles of justice that he should pay the costs of the proceeding, he will be permitted to do so;¹ and the Court will even, under certain circumstances, not only excuse the unsuccessful party from the payment of costs to his opponent, but will actually throw his costs upon the party succeeding. Cases of the latter kind, however, are very limited.²

It is to be observed, that the general rule which gives the costs of the suit to the victorious party, and throws them upon the unsuccessful party, applies equally to cases in which the parties are suing or defending in *autre droit*, and to those in which they are *sui juris*. Therefore, executors, administrators or trustees, instituting or defending suits against strangers to their trusts in those capacities, are subject to the same rules, as to costs, as they would be if they were suing or defending in their own rights. Thus, an executor or administrator instituting a suit against a debtor to his testator's or intestate's estate, as he will, if he succeeds, be entitled, under the general rule, to the costs of his suit from the debtor, so, if he fails, must he pay the costs of his adversary.³ In

of his demand. *Hunn v. Norton*, 1 Hopk. 344; *Woodson v. Palmer*, 1 Bailey, Eq. 95; *Ward v. Davidson*, 2 J. J. Marsh. 443; *Shackleford v. Helm*, 1 Dana, 338; *Bradford v. Allen*, Hardin, 1.

¹ Per Putnam J. in *Clark v. Reed*, 11 Pick. 449; *Travis v. Waters*, 12 John. 500; *Meth. Epis. Church v. Jaques*, 1 John. Ch. 65; *Cowles v. Whitman*, 10 Conn. 121.

² A plaintiff who has filed a bill to quiet his title, which had been neither impeached nor threatened by the defendants, was charged with the defendants' costs, though successful in the suit. *Robinson v. Cropsey*, 2 Edw. Ch. 138.

A party, who is brought before the Court as a mere stakeholder, is entitled to costs. *Dowdall v. Lenox*, 2 Edw. Ch. 267. So, for a mere confirmation of title. *Blight v. Banks*, 6 Monroe, 192. So a party, who is brought into Court, against whom no decree can be made. *Moore v. Fountleroy*, 3 A. K. Marsh. 360.

Costs are not given in the Supreme Court of the United States, where a suit is dismissed for want of jurisdiction. *Inglee v. Coolidge*, 2 Wheat. 363. Costs are not decreed in proceedings in the nature of an amicable suit. *McConnell v. McConnell*, 11 Vermont, 290. A defendant in no fault is not to be charged with costs. *Clay v. Richardson*, 2 A. K. Marsh. 199; *Murray v. Ballou*, 1 John. Ch. 566.

³ See *Westley v. Williamson*, 2 Moll. 458. Where an executor or administrator commences a suit in Chancery, in good faith, upon probable grounds of right, and to enforce a supposed claim of the testator or intestate, he will not be charged with costs. *Murray v. Phillips*, 1 Paige, 472. See *Arnoux v. Steinbrenner*, 1

like manner a trustee for sale, filing a bill against a purchaser for a specific performance of his agreement, is liable to pay or receive costs from his adversary, in the same manner as a person instituting or defending such a suit in his own right.¹ The question, whether a party who sues or defends in *autre droit*, and is unsuccessful, shall be reimbursed his costs out of the estate which he represents, or in respect of which he is a trustee, is a totally distinct one, and will partly be discussed hereafter, when we come to treat of cases in which costs are payable out of the fund which is the subject of litigation.²

There are, however, certain cases, arising from the character sustained by the party, in which the Court generally gives the costs to that party, whatever may be the result of the suit. One of these cases is, where an heir-at-law is made a party to a suit, for the purpose of establishing a claim against real estate. In these cases it is the almost invariable rule of the Court to give the heir-at-law his costs of the proceeding.³ In this respect the heir is more favored than executors. "Executors," says Lord Hardwicke, "shall not have costs, because they may renounce, but it is the Law, which casts the descent upon the heir, and that differs his case from the executor's."⁴

So, where an heir-at-law is made party to a suit for the purpose of proving a will against him, he will be entitled to his costs,⁵ and he will not forfeit this right by cross-examining the plaintiff's witnesses.⁶ So, also, where an heir-at-law is brought before the Court in the case of a charity, he will be entitled to his costs; and, in general, if he makes no improper point, he will be awarded them as between solicitor and client.⁷ And in a charity case,

Paige, 82; Nicoll v. Trustees of Huntington, 1 John. Ch. 166; Goodrich v. Pendleton, 3 John. Ch. 520; Roosevelt v. Ellithorp, 10 Paige, 415; Harrison v. McMenomy, 2 Edw. Ch. 251; Capehart v. Huey, 1 Hill Ch. 405; Peyton v. McDowell, 3 Dana, 314.

¹ Edwards v. Harvey, Coop. 39.

² See post, s. 3.

³ Where specific performance of a contract by the ancestor is decreed against the heir, to whom nothing has come by descent except the property in question, the costs will be charged upon the plaintiff in the suit for performance. Stephen v. Fowler, 9 Paige, 280; Hunter v. Dashwood, 2 Edw. Ch. 415. See Dyer v. Potter, 2 John. Ch. 152.

⁴ Humphry v. Morse, 2 Atk. 408.

⁵ Crew v. Joliff, Prec. in Chan. 93; Luxton v. Stephen, 3 P. Wms. 373.

⁶ Boyer v. Boyer, 1 Dick. 300.

⁷ Currie v. Pye, 17 Ves. 462; see, however, Whicker v. Hume, 14 Beav. 528.

where an heir-at-law was made a defendant, pursuant to an order of the Court, he was allowed his costs as between solicitor and client, although the Court was, upon the hearing, of opinion that there was no resulting trust in his favor.¹

This rule, that an heir-at-law is entitled to his costs, is not, however, without exceptions. Thus, where an heir set up a claim to property as undisposed of under the will and failed, he was refused his costs;² and, where the bill is merely one to perpetuate the testimony of the witnesses to the will, if the heir examines witnesses of his own in chief he will not be allowed his costs of so doing;³ but this is only where the bill does not pray relief, or is not one of a nature to be brought to a hearing. Where the cause is one which may be brought to a hearing, more latitude is allowed;⁴ if he chooses to examine witnesses himself, the question of costs will depend upon the circumstances; but he is indulged in going a step further. On account of the frail and imperfect mode of examining into *facts* in this Court, he has a right, *ex debito justitiæ*,⁵ to demand an issue, to the costs of which, even though the verdict be against him, and the will is established,⁶ he will, unless there are any peculiar circumstances in the case which may induce the Court to refuse them, be considered entitled.⁷ Thus, where one of the witnesses did not clearly prove the execution of the will, and the heir asked for an issue, on the trial of which the will was found duly executed, upon the case coming on for further directions the heir asked for his costs both in Law and in Equity, and they were given him by the Court.⁸

Amongst the peculiar circumstances which will induce the Court to refuse costs to an heir, may be mentioned his attempting to set up insanity or any other disability against the person who made the will.⁹ And there is a case where a defendant, brought

¹ Attorney-General v. The Haberdashers' Company, 4 Bro. C. C. 178.

² Rashley v. Masters, 1 Ves. jr. 205.

³ Berney v. Eyre, 3 Atk. 387; Vaughan v. Fitzgerald, 1 Sch. & Lef. 316.

⁴ Berney v. Eyre, *ubi supra*.

⁵ White v. Wilson, 13 Ves. 87.

⁶ Ibid.; Berney v. Eyre, 3 Atk. 387; Webb v. Claverden, 2 Atk. 424; but see Tuthill v. Scott, 2 Moll. 468; Tucker v. Sanger, 1 M'Lel. & Y. 425; S. C. 13 Pri. 609.

⁷ For the practice with regard to the costs of issues to try the validity of wills, see ante, p. 1116.

⁸ Wright v. Wright, 5 Sim. 449.

⁹ Berney v. Eyre, 3 Atk. 387; ante, p. 1117; Grove v. Young, 5 De G. & Sm. 42.

before the Court as heir, was deprived of his costs, both at Law and in Equity, because he had thought proper to state in his answer to the original bill, that he was heir-at-law to the testator, and to dispute the will, although he knew, as he admitted in his answer to the supplemental bill, that his elder brother had left children.¹

But, although where an heir is brought before the Court as a defendant, he may, under the circumstances suggested, be deprived of his costs, yet this Court will not give costs against him, even though he should insist upon the will's being fraudulent, or the testator being insane, and an issue is directed at Law to try the fraud or insanity, and he fails in the attempt of overturning the will.² It must be a very strong case which will induce the Court to give costs against the heir, such as spoliation or secreting the will,³ or where he vexatiously contests the will by setting up a case of insanity, knowing the deviser to be perfectly sane.⁴

It is to be remarked, however, that it is, in general, in those cases only in which the heir-at-law comes before the Court as a defendant that he is considered as entitled to his costs as a matter of course, where he assumes the character of a plaintiff, and seeks to impeach a will on the ground of insanity, or upon any other ground upon which he might impeach it by ejectment at Law, he will, if unsuccessful, be ordered to pay the costs,⁵ and this even though he be an infant; "because he may, notwithstanding, bring a bill on coming of age, or ejectment; indeed it is not certain whether another *prochein amy* may not bring a bill."⁶

From analogy to the case of an heir-at-law, brought before the Court for the purpose of having a will of his ancestor established against him, Courts of Equity appear to have adopted the rule, that where a bill is filed by an occupier or owner against a vicar or rector, to establish a *modus*, the vicar or rector shall have the

¹ Roberts v. Soones, 7 Sim. 418; and see Burne v. Breen, 1 B. & B. 308.

² Webb v. Claverden, 2 Atk. 424; Smith v. Dearmar, 3 Y. & J. 278; Roberts v. Kerslake, 1 Kay & J. 751.

³ Berney v. Eyre, 3 Atk. 387.

⁴ White v. Wilson, *ubi supra*; ante, p. 1117; Middleton v. Middleton. 5 De G. & Sm. 656.

⁵ Webb v. Claverden, *ubi supra*; Seal v. Brownton, 3 Bro. C. C. 214; Johnston v. Gardiner, 1 Dick. 313.

⁶ Blinkehorne v. Feast, 1 Dick. 153; S. C. 2 Ves. 27; and see Seaf v. Seaf, 4 Russ. 309; Tatham v. Wright, 2 R. & M. 1-32.

costs of the proceeding, unless he disputes the *modus*.¹ Cases, however, of this description can scarcely now occur where the commutation of tithe has been completed throughout the kingdom.

Another case in which the Court generally gives costs to the party, without reference to his success in the suit, is that of a mortgagee or other incumbrancer having a specific lien upon property; the principle of the Court being, that where the owner comes to deliver the estate from the incumbrance which he himself, or those under whom he claims, had put upon it, the person having that pledge is not to be put to expense with regard to that proceeding, and so long as he acts reasonably as mortgagee, to that extent he ought to be indemnified.²

¹ *Berners v. Hillett*, 3 Gwil. 871; *Leman v. Alie*, *ubi supra*; *Cleeves v. Knyfton*, 3 Gwil. 1048; *Clifton v. Orchard*, 1 Atk. 610; see, also, *Cleeves v. Knyfton*, *ubi supra*; and *Beames on Costs* (ed. 1840) p. 46, cases there cited; *Prevost v. Bennett*, 2 Pri. 272; and see *Brookland v. Golding*, Wightw. 100.

² *Detillin v. Gale*, 7 Ves. 584; *Loftus v. Swift*, 2 Sch. & Lef. 642; *Taylor v. Baker*, Dan. Ex. Rep. 71; *Frazer v. Jones*, 5 Hare, 483; *Dunstan v. Patterson*, 2 Ph. 344. Where a party files his bill to redeem, the general rule is, that he must pay costs to the mortgagee, although he should be successful. *Slee v. Manhattan Co.*, 1 Paige, 48; *Vroom v. Ditmas*, 4 Paige, 527. In *Saunders v. Frost*, 5 Pick. 272, the Court say that the rule, that the mortgagee is under no circumstances chargeable with costs, is not only unreasonable, but is opposed to the Statute of Massachusetts, 1798, ch. 77, which expressly authorizes the Court "at their discretion to award costs to either party, as Equity may require." In the above case of *Saunders v. Frost*, upon a bill to redeem, the defendant interposed objections, some of which were groundless and unreasonable, and he failed in his defence, but the plaintiff was also in fault, and the Court refused to allow costs to either party. See *Turner v. Turner*, 3 Munf. 66; *Clark v. Reed*, 11 Pick. 449.

In Massachusetts, where a suit to redeem is brought without a previous tender, and it appears that anything is due upon the mortgage, the plaintiff shall pay the costs of suit, unless it appears that the defendant has unreasonably refused or neglected, when requested, to render a just and true account of the money due on the mortgage, and of the rents and profits, and sums paid for taxes, repairs, improvements, and other necessary expenses, or that he has otherwise, by his default, prevented the plaintiff from performing or tendering performance of the condition before the commencement of the suit. In all other cases of a suit for redemption, the Court may, in their discretion, award costs to either party, as equity may require. Genl. Sts. c. 140, s. 21. In a suit to redeem, the mortgagee will not be subjected to costs, on the ground that "he has unreasonably refused or neglected, when requested, to render a just and true account," merely because the account rendered by him is found, upon examination by the Court, to be to some extent inaccurate. The refusal to render a true ac-

This principle has been applied, also, to those cases in which, although the transaction between the parties did not originally consist in borrowing or lending money, or charging an estate with a particular sum, the Court has thought proper to consider a party advancing money in the light of a mortgagee or incumbrancer. The cases to which I allude are those in which it orders securities to be delivered up or sales of reversionary interests to be set aside, because the bargain has been unconscientious ; in these cases the Court generally decrees for the plaintiff, upon terms, that he shall repay the defendant the amount actually advanced or paid by him, with interest ; and, looking upon him as a mortgagee for that amount, it further treats him as such, by ordering the plaintiff to pay him his costs.¹

It is to be observed, that, at Law, after a mortgage is forfeited, the estate is the absolute property of the mortgagee, and he may deal with it as his own ; he may sell it, or incumber it, or devise it ; if, therefore, the mortgagor applies to a Court of Equity for redemption, it is only granted to him upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts ; therefore, a mortgagor filing a bill to redeem must pay the costs not only of the mortgagee himself but of all persons claiming under him.²

The same rule applies to a foreclosure, as well as a redemption,³ and it is to be remarked that, upon the question of a mortgagee's costs, it in general makes no difference whether the bill is filed by count should be such as would show an intention to embarrass the other party. *Whitwood v. Kellogg*, 6 Pick. 420. In *Miller v. Lincoln*, 6 Gray, 556, where a suit to redeem was brought without previous tender, it was held that the mortgagee, if he had not prevented the performance of the condition by the mortgagor, *was entitled to costs*, although, upon an examination of the account rendered by the mortgagee, it was decided by the Court, that the mortgagor was entitled to an allowance for a large amount of rent for which the mortgagee had rendered no account. See *Platt v. Squire*, 5 Cushing, 551 ; *Putnam v. Putnam*, 13 Pick. 129 ; *Willard v. Fiske*, 2 Pick. 540 ; *Concklin v. Coddington*, 1 Beasley (N. J.) 250. In *Woodward v. Phillips*, 14 Gray, 132, it was held that the mortgagee not having rendered a correct account, and the mortgagor not having made any tender, neither party was entitled to costs.

¹ *Peacock v. Evans*, 16 Ves. 512 ; *Gowland v. De Faria*, 17 Ves. 20 ; *Bowes v. Heaps*, 3 V. & B. 117 ; *Priestley v. Wilkinson*, 1 Ves. jr. 214. See *Holland v. Cruft*, 20 Pick. 337.

² *Wetherell v. Collins*, 3 Mad. 255.

³ *Bartle v. Wilkin*, 8 Sim. 238.

the mortgagor to redeem or by the mortgagee to foreclose; in either case the mortgagee is entitled to his principal, interest, and costs.¹ Thus, where a mortgagee assigned his mortgage money to the trustee of his settlement, and afterwards filed a bill of foreclosure against the mortgagor, to which the trustee was made a party, he was ordered to pay the costs of the trustee and to add them to the mortgage debt.²

A mortgagee, it is to be remarked, will not only be allowed his own costs, and the costs of those claiming under him, but he will be allowed all costs which he may have incurred in asserting or defending his right under the mortgage; thus, where a mortgagee had filed a bill of foreclosure, he was allowed the costs he had incurred in procuring administration to an annuitant under the will of the mortgagor, such annuitant being a necessary party to the foreclosure.³

Where also a first mortgagee, after he had been put to great expense in suits to foreclose, and otherwise in respect to the estate, had a bill filed against him by a second mortgagee to redeem, the Court ordered that his costs should not be taxed as in an adversary suit, but that he should be allowed all his costs and expenses, as is done in the case of a solicitor who lays out and disburses money for his client, the rents to be applied, in the first place, to pay such costs before they were applied to sink the principal.⁴ And on a bill for redemption, it appears that the principle is, that the mortgagee is entitled to be allowed in account, against the mortgagor, all expenses properly incurred for the recovery of the mortgage money.⁵

¹ See *Bradley v. Hitchcock*, Kirby, 231; *Frazer v. Jones*, 5 Hare, 483; *Dunstan v. Patterson*, 2 Ph. 344. A mortgagee, acting as his own solicitor, will be allowed, as against a second mortgagee, his costs out of pocket, but no other costs. *Slater v. Cottam*, 1 Seton Dec. (3d Eng. ed.) 376; Jur. (57) 630, V. C. K.

² *Bartle v. Wilkin*, 8 Sim. 238.

³ *Hunt v. Fownes*, 9 Ves. 70; *Ramsden v. Langley*, 2 Vern. 536; 1 Eq. Abr. 328. So the costs of supporting the mortgagor's title when impeached. *Godfrey v. Watson*, 3 Atk. 517. But a mere equitable mortgagee will not be entitled to the costs of defending his right of possession at law. *Dryden v. Frost*, 3 M. & C. 670. See *Cocks v. Gray*, 1 Gif. 77. Nor of an unsuccessful suit, as for specific performance of a contract to purchase under a power of sale in the mortgage. *Peers v. Ceely*, 15 Beav. 209.

⁴ *Lomax v. Hide*, 2 Vern. 185.

⁵ *Ellison v. Wright*, 3 Russ. 458; see *Peers v. Ceely*, 15 Beav. 209.

In these cases the costs given to a mortgagee are scarcely in the nature of costs in the cause. They are rather sums that the mortgagee has a right to be paid before the relief asked for against him can be granted.¹

The rule, that a mortgagee is to have his costs paid, is subject to an exception in cases where he is a lunatic. In such cases the costs of the committee of a lunatic mortgagee, requisite to enable him to convey to the mortgagor under the statute, are to be paid out of the lunatic's estate, where the lunatic is beneficially interested in the mortgage money, and the petition is presented by the committee.²

The right of a mortgagee or incumbrancer to his costs will prevail in cases in which the court directs a sale of the property pledged ; thus, if a mortgagee files a bill against a mortgagor and subsequent mortgagees to foreclose, but, at the hearing, consents to a sale, he will be entitled to the payment of his costs before the subsequent mortgagees receive any part of their principal, interest or costs, the practice of the Court being to direct each mortgagee to be paid his principal, interest and costs according to his priority.³

It is to be observed, that this rule will not apply where the suit is instituted by a subsequent incumbrancer to ascertain priorities, making a prior mortgagee or incumbrancer a party. In such case the subsequent incumbrancer ought to offer by his bill to redeem the prior incumbrances, and, if he omits to do so, the prior in-

¹ In *Horlock v. Smith*, 1 Col. 298, a mortgagee was not allowed costs of a successful ejectment under the head of just allowances, where the decree was silent as to such costs ; and so, where the decree had not mentioned extra costs, they could not be granted on petition. *Barron v. Lancefield*, 17 Beav. 208. On redemption by a second mortgagee, the original mortgagee will be allowed extra costs incurred by him in foreclosing the mortgagor. *Lomax v. Hide*, 2 Vernon, 185 ; and interest will be allowed on sums expended by him ; and the costs of a stop order, to complete the security on a fund, were allowed the mortgagee upon his petition for payment of the fund out of Court. *Waddilove v. Taylor*, 6 Hare, 307. But extra costs and expenses should be asked by the bill, and mentioned in the decree. 1 Seton Dec. (3d Eng. ed.) 381.

² *In re Wheeler*, 1 De G., Mac. & Gor. 434 ; *Re Townsend*, 2 Ph. 348 ; S. C. 1 M. & G. 686 ; *Re Stuart*, 4 D. & J. 317. Unless, however, the committee declines to present a petition, the costs will not be given to the mortgagor presenting a petition, per Lord Cottenham, S. C.

³ *Upperton v. Harrison*, 7 Sim. 444 ; *Armstrong v. Storer*, 14 Beav. 540 ; *Barnes v. Raester*, 1 Y. & C. 401.

cumbrancer has a right to insist upon being dismissed with costs. But if the prior incumbrancer, instead of asking to be dismissed, consents to a sale and to take his principal and interest out of the proceeds, as he thereby adopts the suit and takes the benefit of it, he must contribute to the costs of it; therefore the costs of all parties will be paid out of the fund, even though there may not be enough left to pay the prior incumbrancer his principal and interest.¹

The rule above laid down, that a mortgagee or incumbrancer is entitled to his costs as well as to his principal and interest, is liable to exception, also, in cases in which the Court considers the party guilty of any misconduct with reference to the suit or the subject of it.² In *Detillin v. Gale*,³ Lord Eldon said, "Though a mortgagee, acting reasonably as such, is to have his reasonable expenses, it does not follow that he can claim his own expenses from other persons, with whom he is litigating, with regard to those acts which, upon his part, are not only unreasonable but grossly oppressive." In that case the mortgagee was deprived of his costs of that part of the suit where he had been guilty of improper conduct: — viz., being a solicitor, he had taken a security for his bill without any settlement of account, and had vexatiously occasioned great delay and expense in the progress of the suit.⁴ So, where a mortgagee set up an unjust defence, insisting on his deed as an absolute purchase, he was deprived of his costs.⁵ And from the recent case of *Smith v. Green*,⁶ it appears that if a first mortgagee

¹ *White v. Bishop of Peterborough*, Jac. 402; see also *Brace v. The Duchess of Marlborough*, Mos. 50; *Pace v. Marsden*, Seton on Decrees, 274.

² Where upon a bill in Equity to redeem, the defendant interposed objections, some of which were groundless and unreasonable, and failed in his defence, but the plaintiff was also in fault, the Court refused costs to either party. *Saunders v. Frost*, 5 Pick. 259. See *Horns v. Holtom*, 1 Seton Dec. (3d Eng. ed.) 376; Jur. (52) 1077, R.; *Slee v. Manhattan Co.*, 1 Paige, 48.

In a case of overpayment, where each party failed in part of his case, no costs were given on either side. *Tanner v. Heard*, 23 Beav. 556.

³ 7 Ves. 583.

⁴ Beames on Costs, ed. 1840, p. 27. More than a sixth part being taken off his bill, he was ordered to pay the costs of so much of the suit as related to that bill, n. (g).

⁵ *Fraucklyn v. Fern*, Barnard, 30; see also *Sevier v. Greenway*, 19 Ves. 413; *Kirkham v. Smith*, 1 Ves. 258; *Baker v. Wind*, 1 Ves. 160; *Thornhill v. Evans*, 2 Atk. 330; *Slee v. Manhattan Co.*, 1 Paige, 48; *May v. Eastin*, 2 Porter, 414.

⁶ 1 Coll. 555.

receives from a second mortgagee a tender of all that is due for principal, interest, and costs, the first mortgagee will not be entitled to costs of a foreclosure suit after the tender.

In *Detillin v. Gale*, above referred to, Lord Eldon appears to have expressed an opinion, not only that a mortgagee might be deprived of his costs, but that, under some circumstances, he might be called upon to pay costs. He said, "It will be an extremely bad precedent to hold, that in no case a mortgagee can be called upon to pay the costs of the mortgagor.¹ I will not say the Court will not, and am very far from saying the Court ought not, to make that precedent, but it ought to be made upon very great consideration." His Lordship afterwards referred to the case of *Shuttleworth v. Lowther*,² in which Lord Lonsdale, a mortgagee, was made to pay costs (on the ground of a tender and an appropriation of the money, which was paid into the bank and refused), as affording an instance in which a mortgagee had been made to pay the costs; and there are other cases in the books which may be cited in support of the same proposition.³ Thus, the principle was acted upon in *Harvey v. Tebbutt*,⁴ where a mortgagee, who had resisted the right to redemption, by setting up a decree of foreclosure collusively obtained, was decreed to pay so much of the costs as was occasioned by his resistance.⁵

¹ See *Saunders v. Frost*, 5 Pick. 272.

² Cited 1 Coll. 586; it is somewhat singular that in referring to the same case in — *v. Trecothick*, 2 V. & B. 181, his Lordship appears to have thought Lord Thurlow's decision to have been different from that which he stated it to have been in the case in the text, and to have expressed his dissatisfaction with it, saying that he should have had no difficulty in giving the mortgagee his costs.

³ *Mocatta v. Margatroyd*, 1 P. Wms. 393; *Baker v. Wind*, 1 Ves. 160; *England v. Codrington*, 1 Eden, 169; *Lord Cranstown v. Johnston*, 5 Ves. 277; *Harmer v. Priestley*, 15 Beav. 569.

⁴ 1 Jac. & W. 197.

⁵ Where a defendant set up a judgment, which was satisfied, and a mortgage in which he claimed more than was due, he was held not entitled to costs against the plaintiff. *Brinkerhoff v. Lansing*, 4 John. Ch. 79. And the plaintiff who failed in supporting his charge that the mortgage was satisfied, and kept on foot by fraud, was also held not to be entitled to his costs. *Brinkerhoff v. Lansing*, 4 John. Ch. 79. Where the mortgagee sets up an unconsentient defence, he is not only refused costs, but must pay costs to the other party. See *v. Manhattan Co.*, 1 Paige, 48. So if he improperly resists the claim of the plaintiff to redeem. *Vroom v. Ditmas*, 4 Paige, 527. See also *Van Buren v. Olinstead*, 5 Paige, 9; *Brockway v. Wells*, 1 Paige, 617; *Saunders v. Frost*, 5 Pick. 271-274; *Union Ins. Co. v. Van Rensselaer*, 4 Paige, 85. Where the plaintiff in a suit to foreclose

In *Hamerton v. Rogers*,¹ where a mortgagee, by his bill of foreclosure, attempted to tack a bond to a mortgage against creditors, his bill was to that extent dismissed with costs; and in *Stokoe v. Robson*,² where the difficulty in the suit was occasioned by the loss of the mortgage deed, the mortgagee was ordered to pay the costs.³

But although a mortgagee may, under peculiar circumstances, not only be deprived of his costs, but be ordered to pay them, there must be positive misconduct on his part to bring such a visitation upon him; ⁴ the mere circumstance, that he has extended his claim beyond what the Court finally decides he is entitled to, will not be a ground for refusing him his costs,⁵ and, although he may have suggested a doubt as to the mortgagor's title to redeem, yet, if the Court thinks there is sufficient ground for entertaining such doubt, he will not be charged with the costs, even where his

so mistakes the rights of the defendant as to render it necessary for him to put in an answer to protect his rights, the plaintiff may be personally charged with the extra costs occasioned thereby. *Union Ins. Co. v. Van Rensselaer*, 4 Paige, 85.

First mortgagee, resisting a suit by a second mortgagee to rectify a mistake, had to pay costs. *Harryman v. Collins*, 18 Beav. 11. A submortgagee had to pay costs of suit to set aside the original mortgage as fraudulent. *Cockell v. Taylor*, 15 Beav. 127; and so the original mortgagee, *S. C.* A mortgagee will pay the costs of an unsustained charge of fraud. *West v. Jones*, 1 Sim. N. S. 218. Where a mortgagee resisted the right to redeem, and mortgagor charged misconduct which he did not prove, mortgagor paid the costs, in *Cowdry v. Day*, Jur. (59) 1199, V. C. S.; 1 Seton Dec. (3d Eng. ed.) 376. A mortgagee who had neglected on request to furnish the mortgagor with the accounts, was not allowed the costs up to the hearing of a redemption suit. *Powell v. Trotter*, 1 Dr. & S. 388. But the merely extending by a mortgagee of his claim, in good faith, beyond what the Court decides he is entitled to, as where he sets up a claim under a tax-title, bought in with intent to protect his mortgage, though disallowed by the Court, is no ground for refusing his costs. *Coneklin v. Coddington*, 1 Beasley (N. J.) 250.

¹ 1 Ves. jr. 513.

² 19 Ves. 385.

³ See *Middleton v. Elliot*, 15 Sim. 536; *Macartney v. Graham*, 2 R. & M. 353; *Price v. Price*, 1 Seton Dec. (3d Eng. ed.) 377.

⁴ *Loftus v. Swift*, 2 Sch. & Lef. 642, 657. See *Willard v. Fiske*, 2 Pick. 540.

⁵ *Loftus v. Swift*, 2 Sch. & Lef. 642, 657; *Whitwood v. Kellogg*, 6 Pick. 420; *Miller v. Lincoln*, 6 Gray, 556; *Davis v. Phelps*, 7 Monroe, 632. Mortgagees of a colliery in possession did not forfeit their right to the costs of a redemption suit, by having overstated the balance due, refused to furnish an account gratis, and dissuaded the mortgagors from redeeming. *Norton v. Cooper*, 5 D. M. & G. 728. But see *Powell v. Trotter*, 1 Dr. & S. 388.

doubt eventually proves unfounded. Thus, where on a bill, by a devisee, to redeem, the mortgagee insisted that the heir of the mortgagor was alive, and, upon a reference, the Master reported him to be dead, whereupon an issue was directed to try whether he was living or dead, upon the trial of which the jury found that he was dead; it was held, that the mortgagee must not pay the costs of the issue, as he could not be charged with vexation in a case where the Court thought there was so much weight in his objection as to direct an issue.¹

It may be collected, also, from several cases,² that the right of a mortgagee to his costs is not defeated by the circumstance of his having remained in possession of the estate after the rents and profits received by him have been sufficient to pay off the principal money and interest due upon the mortgage; the estate being considered as much a security for costs as for the principal and interest; and a decree for costs almost necessarily following a decree for payment of principal and interest.³ If, however, a mortgagee in possession files a bill for a foreclosure, and it turns out, on taking the account, that on the day on which the bill was filed (to which time the account will be directed,) nothing was due to him, he must bear the expense of the suit.⁴

In coming to a decision upon the subject of costs, the Court is frequently governed by its wish to discourage unnecessary litigation. In *Millington v. Fox*,⁵ Lord Cottenham said, that he was very much disposed, as a general rule, to make the costs follow the result; because, however doubtful the title may be, or however proper it may be to dispute it, it is but right that the party

¹ *Wilson v. Metcalfe*, 3 Mad. 45.

² *Owen v. Griffith*, 1 Ves. 350; *S. C.* Ambl. 520; *Trimleston v. Hamill*, 1 B. & B. 377; and *Wilson v. Metcalfe*, 1 Russ. 530; but see *contra*, *Woodroft v. Soys*, MSS. cited Beames on Costs, ed. 1840, p. 26.

³ *East India Company v. Ekins*, 2 Bro. P. C. 382; 6 Vin. Abr. 365, pl. 13; *Thomas v. Puddlebury*, Sel. Ch. Ca. 51.

⁴ *Binnington v. Harwood*, T. & R. 477-485; *Morris v. Islip*, 23 Beav. 244. A mortgagee, who became fully paid during the suit but made a further claim, and brought the suit to a hearing, such claim being unfounded, had to pay the subsequent costs. *Gregg v. Slater*, 22 Beav. 314. So in *Snagg v. Frisell*, 1 J. & Lat. 383, for claiming more than was due and misconduct; and in *Morley v. Bridges*, 2 Col. 621, the mortgagee had to pay costs of suit.

Where overpayment is alleged, the usual course is to reserve costs until the result of the account is certified. 1 Seton Dec. (3d Eng. ed.) 377.

⁵ 3 M. & C. 352.

who really has the right should be reimbursed, as far as giving him the costs of the suit can reimburse him; "but then," he continued, "there is another object which the Court must keep in view, namely, to repress unnecessary litigation, and to keep litigation within those bounds which are essential to enable the parties to vindicate and establish their rights;" and accordingly, although he held that the plaintiffs were entitled to part at least of the relief they prayed, *i. e.* a perpetual injunction, refused to give them the costs of the cause; because it appeared that the defendants had written to the plaintiffs a letter, offering terms which would have rendered the suit unnecessary, which letter, his Lordship held, as to costs at least, rendered it incumbent on the plaintiffs to put to the test, whether the defendants were sincere in their offer, and not to go on with the suit unless they found that they were insincere.¹

In the above case, it is to be remarked, that the letter of the defendants was written before the institution of the suit, but was not received by the plaintiffs until after the bill had been filed. Under these circumstances Lord Cottenham found no fault with the commencement of the suit, but he said, "that having received that letter, it was not proper for the plaintiffs to apply *ex parte* for the injunction; or if they had obtained an order for it, they should not have drawn up the order." Notwithstanding, however, the fact that the plaintiffs did not put themselves in the wrong until after the bill was upon the file, Lord Cottenham refused them the costs of the suit, including those incurred before the receipt of the letter.

The principle, therefore, to be deduced from the case, seems to be, that, if a plaintiff proceeds with a cause after he has received a complete offer of all that he is entitled to, the Court, in the exercise of its discretion with respect to costs, will punish the unnecessary litigation by refusing him the whole costs of the suit,

¹ 3 M. & C. 352; and see *Meador v. M'Cready*, 1 Moll. 119; *Macartney v. Graham*, 2 R. & M. 353. If the parties stand equally fair in every respect, the party who brings the other into Court and is the cause of the litigation ought to bear the expense. *Catlin v. Harned*, 3 John. Ch. 61.

Where a defendant admitted, in his answer, that if a demand of the sum claimed by the bill, had been made, it would not have been complied with, the plaintiff was allowed his costs although no demand was proved. *Glen v. Fisher*, 6 John. Ch. 33; *S. P. Glen v. Fisher*, 6 John. Ch. 36.

as well those incurred after the tender as those incurred before.¹

This principle was not, however, adopted by Sir J. Wigram, V. C., to its full extent, in the case of *Colburn v. Simms*,² for although the defendant in that case had written a letter to the plaintiffs, offering everything which his Honor considered they were entitled to demand, yet he only refused the plaintiffs such costs as were incurred after the plaintiffs were in the wrong; and he observed, that in the case of *Millington v. Fox*, Lord Cottenham's attention was not called to the fact that the expense of filing the bill had been incurred before the plaintiffs received the letter offering compensation.³

It may be remarked, that unless the offer of the defendants extends to everything that the plaintiff has a right to demand, whether in the nature of relief or of costs, the Court will not punish the plaintiff for declining the offer by refusing him his costs. And this will apply, even though the plaintiff has himself made demands to which he was not entitled; for instance, in the case of *Kelly v. Hooper*,⁴ the Court was of opinion that the plaintiff had a right to require an answer to be put in; this right he refused to waive, unless his costs as between solicitor and client were paid, to which he was not entitled. Under these circumstances, Sir J. L. Knight Bruce, V. C., said "If the plaintiff had a fair right to require that step, he had a clear title to sell it for such terms as he might think adequate, and it was equally the right of the defendant, if he thought fit, to refuse that bargain." The defendant was therefore decreed to pay the whole costs of the suit.

In the case of a mortgage, as we have before seen, it has been

¹ A tender of all which the law would require, and a refusal, subjects the party refusing to after-accruing costs. *Rucker v. Howard*, 2 Bibb. 166. A party, who has caused the costs of a suit, by requiring proof of facts well known to himself, should be required to pay them. *Grimes v. March*, 3 A. K. Marsh. 367.

² 2 Hare, 543.

³ Generally, costs are properly adjudged in favor of a party who has good cause to sue at the time he does sue, up to the time of filing of the answer, though such party is ultimately unsuccessful from lapse of time, before filing answer and the happening of other circumstances not then existing. *Philips v. Barbaroux*, 2 B. Mon. 89, 91; *Martin v. White*, 1 Bibb. 584. See *Demarest v. Wynkoop*, 3 John. Ch. 147; *Williams v. Mattocks*, 3 Vermont, 189; *Clark v. Clark*, 4 Hey. 36.

⁴ 1 Y. & C. 197.

held that a *tender*, by the defendant to the plaintiff, of the sum due, will save the costs of the suit.¹ Thus, although a mortgagee is in general considered entitled to his costs, yet, where he has refused a tender of principal and interest due, the Court has not only refused him his costs, but has ordered him to pay the costs of the mortgagor.² The tender, however, must, in such case, be made before the bill is filed; if afterwards, it must be accompanied with a tender of the costs incurred by the mortgagor.³

And the rule appears to be general that, wherever costs have been necessarily incurred by a plaintiff in seeking a demand, a tender by the defendant to obviate future costs must extend to the costs already incurred.⁴

It is, however, to be remarked, that a plaintiff in refusing to accept a tender of the amount due, because the costs do not form part of the tender, must be careful to ascertain that costs have been actually incurred by him, otherwise he will subject himself to the payment of any future costs which he may occasion to the defendant.⁵

If the tender be clogged with conditions, which the party has no right to impose,⁶ it will not be effective to excuse the party making it from his costs; therefore, where an executor, although he had offered to pay a legacy given to the plaintiff for her life, and afterwards to her children, had qualified his offer, by insisting that it should be laid out in such security as he should approve of, Lord Gifford, M. R., ordered the costs to be paid out of the testator's general estate to which the executor was entitled as residuary legatee, on the ground that the executor had no right to add such a stipulation to his offer.

If a tender is not legal, a Court of Equity will not support it; nor will it supply a defect in a tender against a rule of Law, un-

¹ See *Smith v. Bailey*, 10 Vermont, 163.

² *Shuttleworth v. Lowther*, cited by Lord Eldon in *Detillin v. Gale*, 7 Ves. 582-586; see also, — *v. Trecothick*, 2 V. & B. 181; *Williams v. Sorrell*, 4 Ves. 389; and *Roberts v. Williams*, 4 Hare, 129; *Smith v. Green*, 1 Coll. 555; *Wilson v. Cluer*, 4 Beav. 214; *Harmer v. Priestley*, a redemption suit, 16 Beav. 569, and ante, p. 1470.

³ A mortgagee had to pay costs subsequent to a tender made pending the suit, in *Sentance v. Porter*, 7 Hare, 426.

⁴ *Worrel v. Miller*, 3 Anst. 632.

⁵ *Henning v. Willis*, 3 Gwill. 898; *Beames on Costs*, 67.

⁶ *Walter v. Patey*, 1 Russ. 375.

less, perhaps, where fraud is used to prevent its operation ;¹ and where parties came into this Court, to be relieved from a legal demand, on the ground that they had made a tender, Lord Hardwicke refused to relieve, because the tender might have been pleaded at law.²

It is to be recollected also, that a tender must, as has been mentioned before, be proved ; a mere statement of it in an answer is not sufficient to save the costs.

The principle upon which the Court acts, in admitting a tender, duly proved, as a ground for excusing the party making it from payment of costs, viz., the encouragement of attempts to prevent litigation, will apply to cases of account, where, although from the uncertain state of the account the accounting party is not able to make a specific tender of the balance due from him, yet, if he has shown a willingness to render an account, the Court will, upon final adjudication, take such willingness into consideration, and exonerate him from paying the costs to the other party, although the result may be that the balance is against him.

It may be collected from many of the cases referred to, that the Court regards, in some respects, the granting of costs to a party somewhat in the light of a testimonial of good conduct ; and that it will, generally, withhold such testimonial from a party who has been guilty of any misconduct with reference to the subject of the suit,³ even where, under other circumstances, that party would have been considered entitled to them.⁴ This position is strongly exemplified in the case of mortgagees or incumbrancers, whose *primâ facie* right to costs may, as we have seen, be defeated by their conduct.⁵ And so, although there is no rule more general with respect to costs, than that “where the bill claims, on the ground of fraud, the decree or order of dismissal shall, in either event, be with costs,”⁶ yet, where the party succeeding is *particeps criminis*, the Court will not consider him entitled to the costs of

¹ Per Lord Hardwicke in *Gammon v. Stone*, 1 Ves. 339.

² *Ibid.*

³ *Armstrong v. Blake*, 1 Moll. 178.

⁴ Where material misrepresentations on the part of the defendant were established, and the bill was dismissed for other causes, no costs were allowed to him. *Bradley v. Chase*, 22 Maine, 511. So, no costs will be allowed to a plaintiff in fault, though his bill is sustained. *Wright v. Lynde*, 1 Aik. 383.

⁵ *Ante*, p. 1470.

⁶ *Scott v. Dunbar*, 1 Moll. 442.

the litigation, — as in the case of bills for the delivering up of securities given upon considerations which are contrary to the policy of the law, such as marriage, brocage bonds, &c. ; in such cases, although the Court, acting upon principles of public policy, will set aside the bond at the instance of the husband, yet it will do so without giving him the costs of the suit which he has instituted for that purpose ; and so where a bill was filed for delivering up a bond, given by the plaintiff to the defendant's wife in consideration that she would use the influence and power she had over the plaintiff's grandfather, (an old man of eighty-two,) to induce him to leave his whole estate to the plaintiff, the Court, although it set aside the bond as being given without consideration, gave no costs on either side.¹

The rule upon which the Court acts in depriving a successful party of his costs, where he has been guilty of fraud or other misconduct of that description, has been extended to cases where there has been an improper concealment not amounting to a fraud ; and it may be noticed generally, that the Court not only expects that there should be an absence of fraud on the part of the party applying to it for relief, but even where there has been no positive fraud, but the conduct of the party has not been strictly honorable, it will, in cases where the application is to the discretion of the Court, visit him with costs ;² and so if a party obtains an unconscionable advantage over another, the Court, although it may not feel itself justified in depriving him of the advantage he has gained, will not give him his costs of enforcing it ; therefore, if a purchaser obtains a bargain at an inadequate price, but which the Court may be bound to enforce, it will not give him costs against the seller, whose estate he has obtained at an under value.³

So where a plaintiff has slept upon his rights for a *great number of years*, and has allowed the defendant to suppose that he would not enforce them, he will frequently, although successful, be deprived of his costs.⁴

Thus, where a legacy was given to an infant, and the executor advanced moneys during his minority for his maintenance, and afterwards left him, by his will, a larger legacy than the one to

¹ Debenham v. Ox, 1 Ves. 276.

² Danis v. Symonds, 1 Cox, 402. See Kane v. Van Vranker, 5 Paige, 62.

³ Burrowes v. Lock, 10 Ves. 470 ; 3 Sugd. V. & P., ed. 1840, 147.

⁴ Anon. 2 Atk. 14 ; see Clifton v. Orchard, 1 Atk. 610 ; Pearce v. Newlyn, 3 Mad. 186 ; see, also, Guest v. Homfray, 5 Ves. 818.

which he was before entitled, upon a bill filed by the infant, ten years after he came of age, against the executor of the executor, claiming payment of the legacy and interest, the Court refused to allow the sums advanced by the executor for maintenance, or the legacy given by the executor, to be set off against the legacy given by the original testator, and decreed it to be paid with interest from the time of filing the bill, but, in consideration of the circumstances, and of no demand having been made for ten years, the decree was made without costs.¹

Sometimes, where there has been a misunderstanding between the parties, and the bill is in consequence dismissed, the Court will not give costs to the defendant: thus, where a bill was filed for a specific performance, and the Court was of opinion, that there was no concluded agreement, and that all the correspondence together did not amount to more than a treaty, it dismissed the bill, but, in consideration that it appeared to have been a case of misunderstanding, arising from the want of clear unequivocal conduct and language, it was dismissed without costs.²

The Court will also refuse costs to a vendor, although it decrees a specific performance at his suit, in cases in which the vendor's own representation has given the purchaser a probable cause of suit.³

As the Court will not tolerate fraud in any form, so will it discountenance a groundless allegation of fraud in a bill or other pleading, and upon this principle it is that the rule is now established, viz., that where the bill claims on the ground of fraud, the bill will be dismissed with costs if the fraud is not established; and so, although a plaintiff may fail in establishing his claim, yet if the defendant has set up fraud or misrepresentation as a defence, which are disproved, he will be made to pay the costs occasioned by that defence.⁴

¹ *Lee v. Brown*, 4 Ves. 362.

² *Stratford v. Bosworth*, 2 V. & B. 341; *Marquis of Townshend v. Stangroom*, 6 Ves. 328. Where the plaintiff had good reason to believe he had sufficient cause for bringing his suit, but, upon the defendant's answer, it appeared that such cause did not exist, the plaintiff will not generally be held to pay costs, if the defendant was in such a situation as to render it probable that he was amenable to the plaintiff upon equitable principles. But if the plaintiff knew all the facts of the case and made a claim in Equity which was successfully resisted, he will be adjudged to pay costs. *Clark v. Reed*, 11 Pick. 446, per Putnam J.

³ *Fenton v. Browne*, 14 Ves. 144.

⁴ *Wright v. Howard*, 1 S. & S. 190. See *Brinckerhoff v. Lausing*, 4 John. Ch.

Where, however, the vendor had failed in making out his title, upon an objection to the abstract originally taken by the purchaser, but afterwards succeeded in establishing it upon another ground, the Court, although it directed the performance of the contract, gave the costs to the purchaser.¹

And where both parties had been equally foolish, the one in selling and the other in buying an estate, which was liable to be defeated upon a contingency, which contingency had actually happened before the contract was entered into, Lord Chief Baron Richards, although he set aside the contract, ordered each party to pay their own costs.²

In suits for the specific performance of agreements for the sale or purchase of estates, the circumstance of the title being bad only makes a *prima facie* case for costs, which is capable of being rebutted by circumstances;³ and, in *Staines v. Morris*,⁴ Lord 79; *West v. Jones*, 1 Sim. N. S. 218; *Cowdry v. Day*, 1 Seton Dec. (3d Eng. ed.) 376.

¹ *Fielder v. Higginson*, 3 V. & B. 142; and see *Sidebotham v. Barrington*, 5 Beav. 261.

² *Hitchcock v. Giddings*, Dan. Ex. Rep. 1; 4 Pri. 135, S. C. If it should appear that both parties are in fault, the Court will not give costs to either. *Clark v. Reed*, 11 Pick. 446, 449; *Saunders v. Frost*, 5 Pick. 259, 274; *Caldwell v. Leiber*, 7 Paige, 483; *Dorsey v. Smith*, 7 Harr. & J. 345. So costs were allowed to neither party where the plaintiff failed on the main merits of his bill, and the defendant acted against good faith and in violation of his moral obligations to the plaintiff. *Pinnock v. Clough*, 16 Vermont, 500. So, where the plaintiff, seeking the aid of the Court, failed to establish his title, but the defendant showed no better title. *Nicoll v. Huntington*, 1 John. Ch. 166.

And where both parties are equally innocent, and are endeavoring to avoid a loss caused by a third person, no costs will be awarded to either party against the other. *Pendleton v. Eaton*, 3 John. Ch. 69. Nor where both parties have claimed what they were not entitled to, and each has succeeded as to part of the matters in litigation between them. *Crippen v. Hermance*, 9 Paige 211.

³ *Edwards v. Harvey*, Coop. 40; *Monro v. Taylor*, 8 Hare, 51; *Abbott v. Swooner*, 4 De G. & Sm. 460; *Sherwin v. Shakespeare*, 17 Beav. 267; *Freer v. Hesse*, 4 De G., Mac. & Gor. 497. A vendee entitled to specific execution of his contract, is entitled to costs. *Hart v. Brand*, 1 A. K. Marsh. 162. See *Dyer v. Potter*, 2 John. Ch. 152. Costs are awarded on a decree correcting a mistake in a contract, on a bill for that purpose, and for specific performance. *Keisselbrack v. Livingston*, 4 John. Ch. 149. See *Dustin v. Newcomer*, 8 Ohio, 49, where it was held, that a vendee, on obtaining a decree for specific performance, is not entitled to costs, where he has made no tender of the purchase-money. And in *Galloway v. Barr*, 12 Ohio, 354, it was held that he is not entitled to costs, even if the money was tendered by him, unless it is brought into Court.

⁴ 1 V. & B. 8, 16.

Eldon remarked, that, as to the costs of a suit in Equity, although it was in many cases very hard that they should follow the event of the cause, yet all his experience had persuaded him that it was much to be wished that it was so, but that certainly it was not the present course of the Court, and that where there is a fair case for consideration, it is not the course to visit the party who fails with costs. In that case, he held, that the purchaser was wrong in resisting a covenant which he was bound to enter into, yet as the Master's opinion had been the other way, and the Judges at Law would not decide the case until they had the opinion of the Court of Chancery, and professional men had differed upon the question, it would, he said, be too presumptuous in him to set such a value upon his own opinion, by marking the resistance of the purchaser with costs, and therefore he made the decree without costs.¹

It is to be noticed that, where the Court comes to a decision upon a point of Law which is contrary to a former decision, either of this Court or of any other of competent jurisdiction, it will generally exonerate the party against whom it decides from the payment of costs to his adversary, as in the case of *Rose v. Calland*,² above referred to ;³ but where the point has been decided before, and the Court thinks that the decision was correct, it will, if the party, against whose interest the decision is, had notice of the previous determination, fix him with the costs of the litigation ; thus, where a bill was filed for a specific performance, and the purchaser set up an objection to the title, which had already been decided in a former case, of which the purchaser had notice, the purchaser was decreed to pay the costs of the suit.⁴

And here it may be remarked that, in suits for specific performance, it is not the mere failure of an objection taken by the purchaser to a title, that will fix him with costs : a purchaser is considered as entitled to take a fair objection ; and, although it be overruled, yet the Court will not, on that ground, give costs

¹ See 3 Sugd. V. & P., ed. 1848, 87 ; *Rose v. Calland*, 5 Ves. 187 ; 11 Ves. 337 ; *Willcox v. Bellaers*, T. & R. 491.

² 5 Ves. 186.

³ See *Sutton Harbor Improvement Co. v. Hitchens*, 15 Beav. 161 ; S. C. 1 De G., Mac. & Gor. 161. So in cases of great novelty, it is said that the Court ought not to give costs to either party. *Jones v. Mason*, 5 Rand. 577 ; *Hoffman v. Skinner*, 5 Paige, 526. And also in cases where the practice of the Court on the subject was unsettled. *Hoffman v. Skinner*, *supra*.

⁴ *Biscoe v. Wilks*, 3 Mer. 456.

against him ;¹ this, however, must always depend upon the weight which the Judge may think due to the objection.²

But where a vendor sells an estate, his title to which is clearly bad, the Court will dismiss his bill with costs ;³ and this it will do even where the defect has been occasioned by an accident, as where the title-deeds were burnt after the contract ;⁴ and it seems that if there is one decided objection to the plaintiff's case, which prevails, the circumstance, that the defendant has taken others which have failed, will not relieve the plaintiff from his costs.

It seems, however, that if the Court thinks an objection groundless, although it was supported by the opinion of counsel, upon which the purchaser acted, yet the party taking it will be compelled to pay the costs ; for the Court cannot allow the mistaken advice of a third person, to operate to the disadvantage of the party who is clearly in the right.⁵

In most of the cases before stated, the Court, in withholding the costs of the suit from the successful party, has been influenced by the conduct of the party with reference to the suit or the subject-matter of it ; there are, however, many cases in which the Court, without any reference to the good or bad conduct of any party, has refrained from awarding costs to be paid by the unsuccessful party, solely from consideration of the peculiar hardship of the individual case. Instances in which the Court has, upon this ground, departed from its general principle, are referred to in the note,⁶ and many others occur in the books ; it is, however, useless to state them more fully, since they involve no general principle beyond what has been stated, and depend upon the circumstances of each case as they appeared to the Judge who heard it.

¹ 3 Sugd. V. & P., ed. 1840, 141 ; and see *Cox v. Chamberlain*, 4 Ves. 631 ; *Staines v. Morris*, 1 V. & B. 8 ; *Sharp v. Roahde*, 2 Rose, 192.

² 3 Sugd. V. & P. *ubi supra* ; see *Burnaby v. Griffin*, 3 Ves. 266 ; *Bishop of Winchester v. Paine*, 11 Ves. 195 ; *Powell v. Martyr*, 8 Ves. 146 ; *Fludyer v. Cocker*, 12 Ves. 25 ; *Calverley v. Williams*, 1 Ves. jr. 210 ; *Weddall v. Nixon*, 17 Beav. 170.

³ *Playford v. Hoare*, 3 Y. & Jerv. 175.

⁴ *Bryant v. Busk*, 4 Russ. 1.

⁵ *Maling v. Hill*, 1 Cox, 186 ; see, also, *Vancouver v. Bliss*, 11 Ves. 448 ; and see *M'Queen v. Farquhar*, 11 Ves. 467.

⁶ *Shales v. Barrington*, 1 P. Wms. 481 ; *Drybutter v. Bartholomew*, 2 P. Wms. 127 ; *Coppin v. Coppin*, ib. 291 ; *Forbes v. Taylor*, 1 Ves. jr. 99 ; *Brodie v. St. Paul*, ib. 326 ; *Moseley v. Virgin*, 3 Ves. 184 ; *Dickenson v. Lockyer*, 4 Ves. 36 ; *Everett v. Backhouse*, 10 Ves. 94.

With reference to this part of the subject, it may be stated, that, in cases where Courts of Law have assumed a concurrent jurisdiction with Courts of Equity, but the latter have not relinquished their jurisdiction over the subject, the Court of Chancery will not compel the party who seeks relief under its jurisdiction to pay the costs of his proceeding: thus, where a bill was filed by one partner against another, to enforce contribution, and the Court allowed the case to stand over, in order that an action might be tried at Law, which was decided against the plaintiff, the Court, although it dismissed the bill, did so without costs, being of opinion that, although the question was more proper to be tried at Law, the plaintiff was very well justified in coming for a contribution, for certainly this Court had never given up its jurisdiction.¹

On the other hand, in cases in which, after a bill dismissed here, the plaintiff would have had a right to try the question over again at Law, the Court, for the purpose of putting an end to litigation, has frequently dismissed the bill without costs, upon the plaintiff's waiving his right to try the question at Law; ² a rule which has been usefully applied to suits for specific performance.

It is to be remarked, that, in the cases which have been referred to, the Court has marked its opinion of the conduct of the parties, principally by withholding from the successful party the costs which, upon general principles, he would otherwise have been entitled to receive from his adversary; and that in no case, save in those of heirs-at-law and mortgagees and incumbrancers, and others partaking of those characters, has the Court compelled the party succeeding in the suit to pay the costs of it.

The general rule of the Court, indeed, seems to be, that the successful party, although he may, as we have seen, be deprived of his costs, never pays them.³

¹ *Wright v. Hunter*, 5 Ves. 792.

² *Harnett v. Yielding*, 2 Sch. & Lef. 560; see, also, *Lawrenson v. Butler*, 1 Sch. & Lef. 21; *Buxton v. Lister*, 3 Atk. 386; *Underwood v. Hitheox*, 1 Ves. 279; *Leman v. Alie*, Amb. 163; *Attorney-General v. Owen*, 10 Ves. 555.

³ *Lewis v. Loxham*, 3 Mer. 429; *Wykham v. Wykham*, 18 Ves. 395; *Attorney-General v. Oglender*, 1 Ves. jr. 246; *Cooth v. Jackson*, 6 Ves. 41; *Dixon v. Parker*, 2 Ves. 219; *Springfield v. Ollett*, cited 3 Mer. 430, n. Indeed it appears, from the same note, that, according to the decree in *Lewis v. Loxham*, Reg. Lib. 1816, B. p. 1059, the defendant was ordered to pay to the plaintiff his costs of a second reference as to title, and of the report thereon. but not of the

Lord St. Leonards has, however, laid it down, that, if a purchaser files a bill for a specific performance, which is dismissed because the defendant, the seller, cannot make a title, yet the bill may be dismissed, with costs against the vendor,¹ a doctrine which is supported by a *dictum* of Lord Eldon, in *Nicholson v. Wordsworth*,² that, when, on a bill by a vendee for a specific performance, it appears that the defendants cannot make a good title, there is no further question in the cause than who is to pay the costs, — in that case, the bill was filed by the purchaser for a specific performance, insisting that the vendor could not make a good title, and the bill was dismissed with costs; and the corollary, drawn from it by Sir E. Sugden, is, that if a purchaser files a bill for a specific performance, insisting that the seller cannot make a good title, he must pay the costs whether he accept or refuse the title.³

Another instance of departure from the rule, that the successful party is to pay no costs, may be found in the case of a *cestui que trust* making his trustee a defendant to a suit instituted by him against a third party; in that case the *cestui que trust*, although he obtains a decree against his trustee, must pay his costs, unless the trustee has been applied to, to join in the suit as co-plaintiff and has refused.⁴ The proper course to be pursued by a *cestui*

former proceedings, *ibid*; and see *Lewin on Trustees*, App. II. p. 698; *Hay v. Bowen*, 5 Beav. 610; *Westcott v. Culleford*, 3 Hare, 274. In *Brooks v. Byam*, 2 Story C. C. 554, it was remarked by Mr. Justice Story, “In the ordinary course of practice, if a bill be dismissed, the most that is done is, in proper cases, to dismiss the bill without costs to the defendant. I do not say that a case may not be put, in which the Court might go further, and allow costs to the plaintiff, even upon the dismissal. But it must be a very extraordinary case; such, for example, as where the defendant has, by his own fraud, in misrepresenting himself to be the proper and sole party to be sued, as executor, or heir, or devisee, induced, nay, invited the plaintiff to bring the suit, and then has put in a plea, and established the fact that he is not executor, or heir, or devisee.” — “But on this, I give no opinion. The present is not such a case.” See *Sutton Harbor Improvement Co. v. Hitchens*, 15 Beav. 161.

¹ 3 Sugd. V. & P., ed. 1840, 137.

² 2 Swanst. 365.

³ 3 Sugd. V. & P., ed. 1840, 137. So where a purchaser brings his bill for a conveyance of land, when he ought to have tendered, but has failed to tender the purchase-money, he will be entitled to a conveyance on the payment of the purchase-money, but he will be decreed to pay all costs. *Lee v. Bickley*, 6 Litt. 290.

⁴ *Reade v. Sparkes*, 1 Moll. 8.

que trust who intends to file a bill against a stranger relative to the trust property, is stated to be, to apply to become a co-plaintiff, indemnifying him against costs, and then, if he refuses, he must abide his own costs as a defendant; ¹ for it is a rule, that, if a suit is occasioned by the misconduct or obstinacy of a trustee, he may be compelled to pay the whole cost of it.²

The only method, however, of effecting the object of compelling a delinquent defendant to pay the costs of the other defendant, is to order the plaintiff to pay them, and then to permit him to receive them again from the defendant whose delinquency has given rise to the litigation.³ When, however, the Attorney-General is plaintiff, costs may be paid by one defendant to another.⁴

In deciding the question of costs, the Court will frequently apportion them, so as to cause the costs of one part of the suit to fall upon one party, and those relating to another part to fall upon the other party; ⁵ thus, where a plaintiff claims several matters by his bill, and succeeds in establishing his right to a portion only of what he so claims, the Court will sometimes grant him a decree for that part of his case in which he is successful, with costs, to be paid by the defendant, and dismiss the remainder of his bill with costs, to be paid by himself.⁶

So also, where there are several issues, and some are found for the plaintiff and others for the defendant, the parties will be allowed costs on issues found in their favor, and must pay on those against them.⁷

¹ *Reade v. Sparkes*, 1 Moll. 8.

² *Jones v. Lewis*, 1 Cox, 199.

³ See acc. *Weymouth v. Boyer*, 1 Ves. jr. 416; *Parkes v. White*, 11 Ves. 209; *Seton on Decrees*, 2d edit. 30.

⁴ *Attorney-General v. Corporation of Chester*, 14 Beav. 338.

⁵ 1 *Seton Dec.* (3d Eng. ed.) 94, 95, 96; *Platt v. Squire*, 5 Cush. 551; *Jones v. Morehead*, 3 B. Monroe, 377. Where the main question in a bill is decided against the plaintiff, though he succeed in obtaining a decree, the defendant is entitled to his costs up to the time of the decision of the main question. *M'Connell v. M'Connell*, 11 Vermont, 290.

⁶ See *Clinan v. Cooke*, 1 Sch. & Lef. 22. In such cases, also, the Court sometimes contents itself, with making no order at all as to costs, the effect of which is, to throw upon each party the payment of his own.

⁷ *Prevost v. Benett*, 2 Price, 272. See *Thomas v. Fred. Co. School*, 9 Gill & J. 115; *Dupont v. Johnson*, 1 Bailey Eq. 279. Where the whole merits of the

Sometimes, where no part of the bill is dismissed, but a decree is made upon the whole of it, the Court will order the costs of the suit, up to a certain period, to be borne by one party, and the remainder by another. Thus, in suits for specific performance, where a vendor does not make out his title until after the bill is filed, he will be liable to pay the costs of the suit, up to the time when he showed a good title.¹

And so where the vendor established his title subsequently to the decree, after a contest, upon a different ground from that in the abstract delivered, the Court decreed the costs of the inquiry, and of the several applications which were made to the Court, to the purchaser.²

So also, in matters of account, the Court will frequently apportion the costs between the plaintiff and defendant.³

It may be mentioned, in this place, that where, in a cause, the costs are apportioned between the plaintiffs and the defendants, the Court will generally so arrange them, that they may be set off one against the other, and that the balance only shall be paid by the party, from whom, upon setting off such costs, it shall appear to be due.⁴ The Court will also, where there are sums of money to be paid, as well as costs, arrange the demands of each, so as to do justice to all.⁵

Thus, in a suit for the administration of assets, in which, according to the common course of the Court, all the parties are

suit are decided against one party, he will not be entitled to costs of an issue out of the Court, decided in his favor. *Stewart v. Famler*, 1 Harp. Ch. 261.

¹ See ante, p. 1005; 3 Sugd. V. & P., ed. 1840, 140, pl. 13, ib. 143, pl. 23; and see *Townsend v. Champernowne*, 3 Y. & C. 505, Exch. Rep.; *Harford v. Purrier*, 1 Mad. 532; *Wilson v. Allen*, 1 J. & W. 623; *Wynn v. Morgan*, 7 Ves. 202; *Collinge's Case*, 3 V. & B. 143, n.; *Lewin v. Guest*, 1 Russ. 328; *Wilkinson v. Hartley*, 15 Beav. 187; *Winne v. Reynolds*, 6 Paige, 407; *Platt v. Squire*, 5 Cushing, 551.

² *Felder v. Higginson*, 3 V. & B. 140.

³ *Anon.*, 4 Mad. 273, and see *Beames on Costs*, ed. 1840, p. 7.

⁴ Upon exceptions to a Master's report, each party is entitled to the costs of the hearing, as to the exceptions decided in his favor; which costs may be set off against each other. *Richards v. Barlow*, 1 Paige, 323. Thus, where part of the exceptions are allowed, and the rest disallowed, the costs to which the respective parties are entitled may be set off, or a proportionate share of the costs only may be allowed to the party who succeeds as to a majority of the exceptions. *Norton v. Woods*, 5 Paige, 260. See *Simpson v. Brewster*, 9 Paige, 245.

⁵ *Taylor v. Popham*, 15 Ves. 72. See *Battle v. Griffin*, 5 Pick. 167.

entitled to have their costs out of the fund, a party who was a debtor to the estate was not allowed to receive payment of them, whilst his debt remained unsatisfied; but the costs due to him were ordered to be set off, *pro tanto*, against the debt due from him.¹

It is to be observed that, in the above cases, the costs and the duty were respecting matters in the same suit. But it is not the practice of the Court to set off costs of one suit, against the costs or costs and duty due to the party to pay them from the person who is to receive them in another,² unless the two suits are consolidated, so that one order can be made in both.

Where a party is entitled to costs, he should take care and apply for them at the hearing, or at any rate before the decree has been passed, — as, after a decree has been *passed*, the Court will not, on petition, give the costs of the suit to a party, although he was a mere trustee, and as such would have been entitled to them, as a matter of course, if asked for at the hearing.³ Where, however, a trustee did not appear at the hearing, and consequently a decree *nisi* was made against him, without making any provision as to his costs, whereupon he set the cause down again, upon payment of the costs of the day, Lord Kenyon said, the payment of the costs of the day, made the trustee "*rectum in curia*," and as he would most unquestionably have been entitled to his costs, if he had appeared at the original hearing, so he now stood in the same situation, and was therefore entitled to receive them.⁴

Before leaving the subject of costs as between party and party, it should be stated, that when the costs are decreed to be taxed simply, they mean as between party and party. If the costs are taxed as between solicitor and client, or if any costs, charges and expenses, not strictly costs of suit, are to be allowed on the taxation, or in any respect to vary from taxation as between party and

¹ Harmer v. Harris, 1 Russ. 155; Shine v. Gough, 2 V. & B. 33. See, however, Samuel v. Jones, 2 Hare, 246; Cotton v. Clark, 16 Beav. 134.

² Wright v. Mudie, 1 S. & S. 266; Holworthy v. Mortlock, 1 Cox, 202; 2 Bro. C. C. 17; Collett v. Preston, 15 Beav. 458.

³ Colman v. Sarell, 2 Cox, 206; Travis v. Waters, 1 John. Ch. 85; S. C. 12 John. 500; Temple v. Lawson, 19 Ark. 148.

⁴ Norris v. Norris, 1 Cox, 183.

party, they should be expressed in the decree.¹ There is also this distinction in the practice, that when costs are payable out of a fund in Court, they are ordered to be paid to the solicitor of the party, but in other cases they are always ordered to be paid to the parties themselves.²

SECTION III.

Of Costs out of the Fund.

IN the last section an attempt has been made to point out some of the principles by which the Court is governed in awarding the costs of a suit, in cases in which the subject of litigation, not being a fund or estate under the administration of the Court, the costs must necessarily be taken out of the pocket of one party, to be paid into that of another. We shall now proceed to the consideration of those cases, in which an estate, whether real or personal, being the subject of litigation, the Court will order the costs of the suit, or those of some of the parties to it, to be defrayed out of the fund or estate.³

It is a rule, that trustees, agents and receivers, accounting fairly, and paying their money into Court, are entitled to their costs out of the estate, as a matter of course;⁴ and the same rule extends to personal representatives,⁵ with regard to whom, as the decisions of the Court show that they can only obtain complete exoneration by having their accounts passed in this Court,⁶ the Court will give them every opportunity of exonerating themselves, by passing their accounts at the expense of the estate.

This rule is not confined to cases in which they are brought before the Court as defendants; it is a general principle, that a trustee has a right to the protection of the Court, in the execution of his trust; he is therefore entitled to his costs, whether he

¹ 1 Seton, Deerees (3d Eng. ed.) 92, 93.

² Ibid.

³ See *Peck v. Stimpson*, 20 Pick. 312; *Frost v. Belmont*, 6 Allen, 164, 165.

⁴ *Attorney-General v. The City of London*, 1 Ves. jr. 246; 3 Bro. C. C. 171.

⁵ *Rashley v. Masters*, 1 Ves. jr. 105; *Samuel v. Jones*, 2 Hare, 246; *Decker v. Miller*, 2 Paige, 149; *Knox v. Pickett*, 4 Desaus. 199; *Connolly v. Pardon*, 1 Paige, 291; *Floyd v. Baker*, 1 Paige, 480.

⁶ See *Knatchbull v. Fearnhead*, 3 M. & C. 122.

comes before the Court as plaintiff or defendant, unless the act required to be done leads to no responsibility, or his motive is obviously vexatious.¹ And a trustee fairly instituting a suit for the direction of the Court, with regard to the trust, will not only be entitled to his own costs out of the fund, but any person made a party to the suit, for his protection, will also be ordered his costs from the fund; thus, where a bill was filed by trustees, for the direction of the Court as to the application of a trust fund, in the course of which a dispute arose between the two defendants, whether one of them was illegitimate, and the Master found that he was legitimate, — the other was allowed his costs out of the trust fund.² Lord Langdale, M. R., says: I cannot conceive that anything could be more hard than that executors, who are called in to administer estates, where there are doubtful questions arising on the will, and who can be exonerated only by having their accounts passed in a Court of Equity,³ should be deterred from coming to this Court, by being visited with the costs of the proceedings.⁴

Where, however, the act required to be done by a trustee, leads to no responsibility, or his motive is obviously vexatious, he will not be allowed his costs; thus, where trustees under a will refused to pay a legacy to the assignees of a bankrupt, merely because the bankrupt himself had set up a claim to it, their costs of the suit were refused, because the case was too clear to admit of a doubt.⁵

So, where a trustee, from caprice or obstinacy, occasions a suit which would otherwise be unnecessary, he will not be allowed the costs of it, whether he appear in such suit in the character of defendant or of plaintiff; thus, where a person having in his hands a sum of money belonging to an infant, instituted a suit, to have that sum secured for the benefit of the infant, though there was a trustee of a settlement, to whom it ought to have been paid, and

¹ *Curteis v. Candler*, Mad. & Geld. 123; *Noble v. Meymott*, 14 Beav. 471; *Hosack v. Rogers*, 9 Paige, 461; *Chase v. Locherman*, 11 Gill. & J. 185.

² *Hicks v. Wrench*, Mad. & Geld. 93.

³ See *Knatchbull v. Fearnhead*, 3 M. & C. 122.

⁴ *Knox v. Picket*, 4 Desaus. 199; *Morrell v. Dickey*, 1 John. Ch. 153; *Moses v. Murgatroyd*, 1 John. Ch. 473; *Dunscomb v. Dunscomb*, 1 John. Ch. 508; *Goodrich v. Pendleton*, 3 John. Ch. 520; *Warden v. Burts*, 2 M'Cord Ch. 76; *Wright v. Wright*, 2 M'Cord Ch. 191; *Delafield v. Colden*, 1 Paige, 139; *Pritchard v. Hicks*, 1 Paige, 270; *Hosack v. Rogers*, 9 Paige, 461; *Armstrong v. Zane*, 12 Ohio, 287.

⁵ *Knight v. Martin*, 1 R. & M. 70.

who was willing to receive it, his costs out of the fund were refused.¹

Although trustees, or other persons standing in that character, are, as we have seen, generally held entitled to their costs out of the estate, yet they will not be permitted unnecessarily to burden the fund, by costs which they might have avoided; thus, although two or more trustees, having a fiduciary character, may, notwithstanding they employ separate solicitors, and put in separate answers, have each his costs,² yet they will not be allowed to make use of this privilege in an oppressive manner; and, therefore, where a trustee, who had not acted, put in a full answer to the whole bill, an order was made at the hearing, to tax him the costs of such answer only as would have been necessary and proper.³

Trustees and personal representatives brought into Court will not be deprived of their costs, because they make a claim for their own benefit and fail, when the suit is not instituted for their individual benefit, or when no additional costs are caused by the claim;⁴ but where a trustee has a private interest of his own, separate and independent from the trust, and obliges the *cestui que trust* to come into this Court, merely to have the point relating to his own private interest determined at the expense of the trust.⁵ Upon this ground, where on a bill filed for a residue, the defendant, the executor, by his answer, stated declarations of the testatrix, that her other relatives should have no more than their

¹ *Ellis v. Ellis*, 1 Russ. 368; in general, where a trustee, through his neglect or obstinacy, occasions the suit, he will be ordered to pay the costs of it; see post. *Thorby v. Yeats*, 1 Y. & C. 438. Where heirs, executors, or administrators, bring groundless or vexatious suits, they will be ordered to pay costs. *Getman v. Beardsley*, 2 John. Ch. 274.

² See *Reade v. Sparkes*, 1 Moll. 10; *Aldridge v. Westbrook*, 5 Beav. 212. For the rule as to costs, where they employ the same solicitor, yet put in separate answers, see ante, pp. 742, 743, and 27th Order of 1828.

³ *Martin v. Persse*, 1 Moll. 146; *Blount v. Burrow*, 3 Bro. C. C. 90.

⁴ *Rashley v. Martin*, 1 Ves. jr. 205. Thus, where an executor, who is indebted to the estate, has a right to ask the aid and protection of the Court in paying over the money due by him, he will be entitled to his costs out of the fund. *Decker v. Miller*, 2 Paige, 149. So, if the executor, who was a creditor of the estate, had a right of preference over other creditors, and was compelled to come into Chancery to obtain such preference, his costs will be paid out of the fund. *Ibid.*

⁵ *Henley v. Philips*, 2 Atk. 48; *Dupont v. Johnson*, 1 Bailey Eq. 279; *Gardner v. Gardner*, 6 Paige, 455; *Hunn v. Norton*, 1 Hopk. 344.

express legacies, and hoped to prove that the surplus was intended for himself as executor, he was made to pay the cost for thus insisting upon the surplus.¹

As the Court will not allow trustees to take advantage of the rule of the Court in their favor, to obtain a determination upon their own rights, so it will not tolerate their attempting to defeat the claims of their *cestui que trust*, by setting up an improper defence.²

And so, if a trustee sets up a trust different to what it actually is, the Court will deprive him of his costs, although he does it not to benefit himself, but another. Thus, where the defendant, who was the trustee of her daughter's settlement, upon a question between the husband and wife, whether the wife, who was separated from her husband and lived in a state of adultery, was entitled, under the settlement, to the dividends of a sum of stock to her separate use, insisted, contrary to the fact, that it was the intention of the parties, that a provision for the separate use of the wife should be introduced into the settlement, it was considered sufficient ground to deprive her of her costs.³

It may be noticed, however, that a mere disallowance of credit, honestly claimed by an executor, where he is mistaken, is not enough to disentitle him to costs: therefore, where an executor's account was surcharged by the amount of a credit taken for the proportion of an annuity, payable by the testator, during his life, to the executor, but which was not apportionable, the mistake was not considered a ground to deprive the executor of his costs.⁴

If a person, standing in the situation of a trustee, by his neglect or misconduct occasions the suit, he will be deprived of his costs out of the estate.⁵

So, also, if a trustee, having taken upon himself the trust, afterwards refuses to act, and thereby renders a suit for the appointment of a new trustee necessary, he will be refused his costs.⁶

And if an executor commits a fraud, he will not be allowed his

¹ Bayly v. Powell, Prec. in Ch. 92; S. C. 2 Vern. 361.

² Lloyd v. Spillet, 3 P. Wms. 346; S. C. 2 Atk. 148.

³ Ball v. Montgomery, 2 Ves. jr. 191.

⁴ Bennett v. Going, 1 Moll. 529.

⁵ O'Callaghan v. Cooper, 5 Ves. 129; Thorby v. Yeats, 1 Y. & C. 438. Where the necessity for a sale arose from an administrator's ill conduct, he was held responsible for the costs. Blevins v. Sympson, 2 B. Monroe, 463, 464.

⁶ Howard v. Rhodes, 1 Keen, 581.

costs, though the testator has directed that his executors shall be reimbursed any expenses they may incur out of the property.¹

In like manner if a personal representative or other trustee *improperly* retain trust moneys in his hands, he will be deprived of the costs of the suit.² In order, however, to disentitle him to costs, he must be guilty of some impropriety of conduct, the mere circumstance of his being found in debt to the estate will not be sufficient, even though he may be ordered to pay interest on the balance.³

In *Travers v. Townsend*,⁴ Sir A. Hart, L. C., said, he had often heard it stated as a principle, by some of the greatest Judges, that an executor, though in the result made answerable for default, by reason of loss incurred through his neglect, or charged with interest for retaining money in his hands, yet, if there was nothing beyond such negligence, or retention of money against him, was still entitled to the costs of the suit.

So also, although, in general, a trustee committing a breach of trust, which may render an application to this Court necessary, will be deprived of his costs, yet, where the breach of trust consisted of the improper application of a small part of the trust fund, which was promptly offered to be restored, and the suit was for other purposes of the trust, there being no imputation against the trustee, he was held not to be disentitled to his costs.⁵

In most of the cases above referred to, the Court has contented itself with marking its disapprobation of the conduct of the trustee or personal representative, by withholding from him his costs, to which he would otherwise have been entitled out of fund; it frequently, however, happens that the Court will go further, and will not only deprive the trustee or representative of his costs, but will compel him to pay the costs of the suit out of his own pocket; and it may be stated, as a general rule, that, if any particular in-

¹ *Hide v. Haywood*, 2 Atk. 126.

² *Dawson v. Parrot*, 3 Bro. C. C. 236.

³ *Parrot v. Treby*, Prec. in Ch. 254. It appears, from some cases, to have been considered, that where the Court gives interest against executors or other trustees as a remedy for a breach of trust, the costs follow of course; see *Seers v. Hind*, 1 Ves. jr. 294; *Roche v. Hart*, 11 Ves. 62; *Mosley v. Ward*, *ibid.* 583; but see *Ashburnham v. Thomson*, 13 Ves. 404; *Holgate v. Haworth*, 17 Beav. 259.

⁴ 1 Moll. 496; see also *Flanagan v. Nolan*, *ibid.* 84; *Knott v. Cottee*, 16 Beav. 77.

⁵ *Fitzgerald v. Pringle*, 2 Moll. 534; *Heighington v. Grant*, 1 Phil. 600.

stance of misconduct, or a general dereliction of duty in a trustee, is the immediate cause of a suit being instituted, the trustee, on the charge being substantiated against him, must pay the costs of the proceedings his own improper behavior has occasioned.¹ Upon this principle, where an executor, directed to lay out the testator's personalty in the funds, unnecessarily kept large balances in his hands, and resisted the payment of debts, by false pretences of outstanding demands, he was charged with the costs.² And where an executor retained a balance in his hands longer than was necessary to answer contingencies, he was ordered to pay interest and costs, although it appeared that he always kept a sum ready at his banker's to defray the amount.³

And where an executor obtained from a legatee a release from a legacy for which no consideration was given, he was ordered to pay the costs of the suit instituted to set aside such release.⁴

It has also been held, that if executors make an unfair appraisement, and otherwise misbehave themselves in their trust, they will be liable to costs.⁵ And where trustees kept possession of an estate from their *cestui que trust*, whom they considered a lunatic, upon a bill filed by the supposed lunatic, they were ordered to pay the costs of the suit, although it did not appear that they had acted upon any corrupt motive, but were merely, as they considered, protecting the property for the benefit of those in remainder.⁶ Indeed, it seems that, in general, although his motive may not have been corrupt, if a trustee, by his improper conduct, occasions a suit, the Court will fix him with the costs.⁷ Thus, if he

¹ Lewin on Trustees, p. 452. This rule applies also where corporations are trustees for charities; see *Attorney-General v. Hobert*, Rep. t. Finch, 259; *Haberdashers' Company v. Attorney-General*, 2 Bro. P. C. 370; *Marshall v. Sladden*, 4 De G. & Sm. 468; *Getman v. Beardsley*, 2 John. Ch. 274; *Blevins v. Sympton*, 2 B. Monroe, 463, 464, cited ante, 1491, note 5. Where executors litigate their own private interests, they will be ordered to pay costs. *Dupont v. Johnson*, 1 Bailey Eq. 279. See *Gardner v. Gardner*, 6 Paige, 445; *Hunn v. Norton*, 1 Hopk. 344.

² *Crackelt v. Bethane*, 1 Jac. & W. 386; see also *Mosley v. Ward*, 11 Ves. 581; *Piety v. Stace*, 4 Ves. 620.

³ *Franklin v. Frith*, 3 Bro. C. C. 433.

⁴ *Horsley v. Chaloner*, 2 Ves. 83.

⁵ *Sheppard v. Smith*, 2 Bro. P. C. 372.

⁶ *Brown v. How*, Barnard, 354.

⁷ See *Caffrey v. Darby*, 6 Ves. 488. See *Warbass v. Armstrong*, 2 Stockt. (N. J.) 263.

refuses to act from caprice or obstinacy, "it would be against the interests of society to hold that he should not be fixed with the costs occasioned by it."¹

So also, where the suit has been occasioned by a breach of trust, the trustees will be compelled to pay the costs; thus, where trustees, with the privity of the wife, sold out stock which had been settled to her separate use, and paid the proceeds to the husband, taking his bond of indemnity, and the husband afterwards died insolvent, whereupon the trustees replaced the stock, — upon a bill filed by the widow and children to have the fund secured, the trustees were considered as having caused the suit by their breach of trust, and were ordered to pay the widow the amount of the dividends from the husband's death, with the costs of the suit.²

In like manner where a trustee, mistaking his power, sold stock without authority, and, with the produce, purchased land, without having the power to do so, he was ordered to replace the stock and to pay the costs.³

And where the trustee of a legacy, which had been invested in stock, authorized another person, who was supposed to be entitled to the management of it, to sell it out and receive the produce, it was held, that the trustee was answerable for the stock, and he was ordered to pay the costs, although the legatee, not knowing that the legacy had ever been invested or sold out, had dealt with the party who sold it out as the person accountable for the money.⁴

It seems, that, in order to constitute such misconduct as will induce the Court to visit trustees with costs, it is not necessary that there should have been *misfeasance* on the part of the trustee; simple *nonfeasance*, where it has been productive of mischief to the trust estate, will be sufficient.⁵ Thus, where an executor

¹ See *Taylor v. Glanville*, 3 Mad. 178; see also *Jones v. Lewis*, 1 Cox, 199; ante, p. 1491; *Earl of Scarborough v. Parker*, 1 Ves. jr. 267.

² *Whistler v. Newman*, 4 Ves. 129.

³ *Earl Powlet v. Herbert*, 1 Ves. jr. 297.

⁴ *Adams v. Clifton*, 1 Russ. 297.

⁵ *East v. Ryal*, 2 P. Wms. 284; see, also, *Haberdashers' Company v. The Attorney-General*, 2 Bro. P. C. 370; *Attorney-General v. Hobert*, Rep. t. Finch, 259; *Gray v. Thompson*, 1 John. Ch. 82; *Tiernan v. Wilson*, 6 John. Ch. 411; *Knox v. Picket*, 4 Desaus. 199. See *Black v. Blakeley*, 2 M'Cord Ch. 9; *Sorrel v. Proctor*, 4 Hen. & Munf. 431.

omitted to bring an action to recover a bond debt, he was ordered to pay the costs of taking the accounts.¹

In many cases, also, if there is misconduct on the part of a trustee or personal representative in the course of the cause, the Court will compel him to pay the costs of the suit out of his own pocket. Thus a trustee will be fixed with costs if he wilfully misstate the accounts,² or if he keeps the *cestui que trust* from a true knowledge of the accounts, or even if he has kept the accounts in a very confused manner.³ And wherever the answer of an executor or other trustee is falsified by proof, and he appears to have acted from fraudulent motives, he will be made to pay the costs.⁴ So, if a corporation, being trustees for a charity, suppress or conceal evidence relating to the charity, they will be held liable to the costs of the suit.⁵ And if a trustee, by his answer, set up objections to the performance of his trust, which he does not substantiate, he will be made to pay the costs.⁶

In some cases, where the suit has been occasioned by slight neglect of the trustee, instead of giving any direction with regard to costs, the Court will content itself with making no order upon the subject, thereby leaving it to each party to pay his own costs,⁷ and thus where a trustee, instead of accumulating a fund, as directed by the will, had improperly kept the balance in his hands, yet, as the costs of the suit had in a great measure been occasioned by inquiring what rule the Court ought to adopt with respect to the computation of interest, it was thought hard, under the circumstances, to fix the executor with costs, even relatively to the breach of trust, and, therefore, the Court gave no costs.⁸

And, in some cases, where the conduct of trustees has not been wilful or perverse, the Court has permitted them to have them, although there has been loss to the estate;⁹ thus, where trustees,

¹ Lowson v. Copeland, 2 Bro. C. C. 156, ed. Belt.

² Sheppard v. Smith, 2 Bro. P. C. 372; and see Flanagan v. Nolan, 1 Moll. 86.

³ Avery v. Osborn, Barnard. 349; Norbury v. Calbeck, 2 Moll. 461.

⁴ Vaughan v. Mursdon, Collier's P. C. 175; see, also, Mallabar v. Mallabar, Cal. t. Talbot, 79.

⁵ Borough of Hertford v. The Poor of Hertford, 2 Bro. P. C. 377; Attorney-General v. East Retford, 2 M. & K. 35.

⁶ Willis v. Hiscox, 4 M. & C. 198; Low v. Carter, 1 Beav. 426.

⁷ Newton v. Bennet, 1 Bro. C. C. 362.

⁸ Raphael v. Boehm, 13 Ves. 592; O'Callaghan v. Cooper, 5 Ves. 117.

⁹ Taylor v. Tabrum, 6 Sim. 281; and see Flanagan v. Nolan, 1 Moll. 84.

who were directed to sell an estate as soon as conveniently might be after their testator's death, refused, by the desire of one of the parties interested, 6,000*l.* for the estate, and afterwards sold it for 3,600*l.*, the Court, although it charged them with the loss, gave them their costs, as their conduct had not been wilful nor perverse.¹

When it is said that personal representatives and others bearing the character of trustees, are entitled to their costs out of the fund or estate which is the subject of the suit, the rule must be understood as applying strictly between themselves and their *cestuis que trust*; in suits between them and those who are strangers to the trust, the ordinary rule that *victus victori in expensis condemnandus est* prevails,² though, if a trustee or personal representative institutes or defends a suit in respect of his trust estate, he may reimburse himself, out of that estate, any sums he may have expended properly in such suit.

Thus, where a trustee for sale filed a bill for a specific performance, which was dismissed, it was dismissed with costs, the defendant being considered as having nothing to do with the character in which the plaintiff sued.³

Costs also are given against assignees personally, and not *quà assignees*; they are to pay them, and then may be allowed to draw them out of the estate; but the opposite party is not to be exposed to the hazard, whether the estate is capable of bearing the costs or not; if it be not, it is the misfortune of the assignees.⁴

So also, an executor plaintiff cannot be distinguished, with respect to costs, from the party whom he represents:⁵ and if he revive a suit in which his testator was a party, he will incur his testator's liability to costs. Thus, where an executor, after a bill by his testator had been dismissed with costs, revived the suit, al-

¹ *Travers v. Townsend*, ib. 496.

² *Ante*, p. 1461.

³ *Edwards v. Harvey*, Cooper, 40.

⁴ *Poole v. Franks*, 1 Moll. 78. Where assignees are made parties to a suit, it is not usual, nor necessary, to direct their costs out of the bankrupt's estate; for they may charge them in their accounts, unless there are any special reasons to the contrary; for this would be to charge an estate which is not adversely represented before the Court. In bankruptcy, costs are given out of the estate, because there the Court has jurisdiction over it.

⁵ *Westley v. Williamson*, 2 Moll. 458.

leging that he intended to appeal, he was ordered to pay the costs of the whole suit.¹

It may be here observed, that, even though a specialty creditor should sweep away the whole personal estate, this Court will not let the executor reimburse himself his costs out of the real estate of the debtor.²

So, where a bill was filed for the purpose of raising legacies charged on real estate, there being no personal estate, it was held, that the executor taking out probate in such a case could get no costs;³ the rule is the same in the case of the executor of an insolvent mortgagor.⁴ The case is, however, said to be different with respect to an administrator *ad litem*, who will be entitled to his costs out of the fund,⁵ or if that is deficient, from the plaintiff.

If an executor, who has neither proved nor acted, although he has not renounced, is made a party to a suit, for the purpose of raising charges by the sale of real estate, the personal estate being insufficient, the costs of such executor cannot be paid out of the fund, but must be borne by the plaintiff, as he was not a necessary party.⁶

It is the general rule, that, in suits by a creditor against a personal representative, the Court makes no order with regard to the payment of the representative's costs, upon the principle that the personal representative may reimburse himself those costs out of the personal estate. This applies only to suits by individual creditors for their own demands, a form of suit which does not often occur. Where the suit is instituted either by creditors or by legatees, for a general administration of assets, so that the whole estate of the deceased must necessarily come under the direction of the Court, the practice is different, and the costs of the personal

¹ Horlock v. Priestley, 8 Sim. 621; Lyon v. McKenna, 2 Moll. 460.

² Uvedale v. Uvedale, 3 Atk. 117. In this respect, there is a material difference between an heir-at-law and personal representatives, because they may renounce, "but it is the law which casts the descent upon the heir;" the heir, therefore, will be entitled to his costs out of the fund raised by sale of the estate, although such fund may not be sufficient to discharge the whole of the claims upon it. Humphrey v. Morse, 2 Atk. 408.

³ Nash v. Dillon, 1 Moll. 236.

⁴ Nicholson v. Falkiner, ib. 555.

⁵ Ibid.

⁶ Ibid., *ubi supra*.

representatives are always provided for ; and even where there is a deficiency of assets to pay the whole of the testator's debts, they constitute the first charge upon the fund arising from the personal estate.¹ The right of the personal representative to his costs, in such cases, may be defeated by his collusion, or by some of those circumstances which have been already pointed out as disentitling a trustee from his right to the costs out of the fund : but where there are no circumstances of that nature, the costs of the personal representative constitute the primary charge.²

It may be noticed, in this place, that it appears to have been considered, formerly, that a creditor filing a bill was not entitled to have his costs out of the fund, unless there was enough to pay prior demands upon the estate ; but now the practice is, when a suit has been fairly instituted for the administration of assets, that the first payment, after the payment of the costs of the executor who has not disentitled himself to costs, should be the costs incurred by the plaintiff in the suit.³

But although it is the general rule, that, after the payment of the executor's costs, the plaintiff's costs, in a creditor's suit, are to be the first payment out of the fund brought in, such rule is not invariable ; and if a *puisne* creditor files a bill on the foot of a debt, which, from the state of the fund, he might have known was probably desperate, the Court will, in all probability, refuse such a plaintiff his costs in the cause,⁴ and may make him pay them ;⁵

¹ *Bennett v. Going*, 1 Moll. 529 ; *Young v. Everest*, 1 R. & M. 426.

² Although a plaintiff is entitled to file his bill for an account and distribution, yet where all the charges of fraud, collusion, and misconduct on the part of the defendants, which formed the main ground of the suit, were proved to be false, unjust, and vexatious, the bill was dismissed with costs, as to the defendants not liable to account, and the defendant who was accountable as trustee, was allowed all his taxable costs, extra charges and expenses, out of the fund, before distribution. *Minuse v. Cox*, 5 John. Ch. 441.

³ *Bennett v. Going*, 1 Moll. 529 ; *Young v. Everest*, 1 R. & M. 426 ; *Larkins v. Paxton*, 2 M. & K. 320 ; *Barker v. Wardle*, ib. 818 ; *Lechmere v. Brazier*, 1 Russell, 80. As to the cases where such plaintiffs will be entitled to their costs, as between solicitor and client, see post, pp. 1512, 1513 ; *Loomes v. Stothard*, 1 S. & S. 458, 460 ; *Hare v. Rose*, 2 Ves. 558. A creditor, who came in after the Master had filed his report, and obtained leave to prove his debt, without stipulating to contribute to the costs of the suit brought by other creditors against the executors — the assets not being sufficient to pay all the debts proved — was not allowed his costs out of the fund. *Mason v. Codwise*, 6 John. Ch. 183.

⁴ *Egan v. Baldwin*, 1 Moll. 539.

⁵ *King v. Bryant*, 4 Beav. 460.

and where there was no fund at all applicable to the payment of the general creditors, the plaintiffs were ordered to pay the costs, except the costs of certain defendants, who, having specific liens upon the only fund brought into Court in the suit, had wholly exhausted that fund.¹

It is to be remarked, however, that, in the last-mentioned case, the executor had, by his answer, stated the insolvency of the testator, and that his answer proved correct; but in *Robinson v. Elliott*,² the executrix, although she had represented that her testator was insolvent, which was true, yet, as she was charged with more than she had admitted by her answer, the bill, as against her, was dismissed without costs.

It may be observed, in this place, that in suits by *puisne* incumbrancers or general creditors, for the administration of assets, it is not usual to make persons having prior specific charges, parties to the suit, as they will be untouched by a decree for sale, and may therefore, if they are made parties, insist upon having the bill, as against them, dismissed with costs. They may, however, waive that right and consent to a sale, and to receive payment of their principal and interest out of the proceeds; in which case, although the decree is for the payment of all parties, according to their priorities, that is to be understood only as to their principal and interest; they must all contribute to the costs of suit, of which they take the advantage, consequently the costs of all parties must, in the first instance, come out of the fund.³

The Court acted upon this principle, in *Kenebel v. Scrafton*,⁴ where, in a suit instituted by a first mortgagee, instead of a foreclosure, a sale was directed with the consent of the second and third mortgagees, and the produce not being sufficient to pay them all, the costs were ordered to be paid, in the first instance, out of the fund, although it was objected to by the third mortgagee, whose fund would thereby be diminished.⁵

¹ *Bluett v. Jessop*, Jac. 240.

² 1 Russ. 599.

³ *Brace v. The Duchess of Marlborough*, Mos. 50; *White v. The Bishop of Peterborough*, Jac. 402; *Egan v. Baldwin*, 1 Moll. 539.

⁴ 13 Ves. 370; *Armstrong v. Storer*, 14 Beav. 540.

⁵ See ante, p. 282, note, as to the present practice in suits concerning mortgages. Where a mortgagee brought a bill to foreclose, and subsequent incumbrancers answered and disclaimed as to him, it was held that they were entitled to the costs of their answers, out of the fund, although, as between themselves, they

It is to be remarked, that, although a creditor, who files a bill for an administration of assets, will be entitled to his costs out of the fund in Court, such title will not affect the personal representative's right of retainer for satisfaction of a debt due to himself; and even where part of the personal estate had been paid into Court by an administrator, and another part of it remained in his hands, but there was a debt due to him from the intestate, greater than the amount of both funds, and no other assets to satisfy the general body of creditors, or even to pay the costs of the plaintiff, it was decided, that the administrator's right of retainer was not affected by the circumstance of his having paid the money into Court, and that the plaintiff was not entitled to have his costs satisfied out of the fund, to which the right of retainer extended.¹ But although a personal representative may retain for the amount of his own debt, in preference to the claim of the plaintiff for the costs of the suit, the same thing cannot be done by a devisee of real estates, which are subject to the payment of debts. This rule is laid down in *Loomes v. Stothard*,² that "an executor may retain for his own debt, or the debt of his trustee, and therefore a devisee may retain for his own specialty debt, or the debt of his trustee; and if the devisee is also the executor of a deceased creditor, he may retain for his own debt, and next for that of his testator; but the devisee cannot retain his debt in priority to the costs of the suit; because the costs of the suit are to be considered as expenses in administering the estate, and are the first charge upon an estate, whether administered in or out of Court." If, however, a devisee states in his answer, that his right of retainer will exceed the assets, after such notice, the plaintiff may be considered as proceeding at the peril of costs.³

contested the right to the surplus. *Mackie v. Cairnes*, 5 Cowen, 547; *Catlin v. Harned*, 3 John. Ch. 61. Where the widow was necessarily made a party to a bill of foreclosure, she was held entitled to her costs out of two thirds of the surplus in Court, without prejudice to her claim of dower out of the gross amount of the surplus. *Tabele v. Tabele*, 1 John. Ch. 45. Where a defendant disclaims he is ordinarily entitled to costs. *Usher v. Jouitt*, 5 Litt. 32; *Ford v. Chesterfield*, 16 Beav. 520; *Bellamy v. Brickenden*, 4 K. & J. 670; *Gurney v. Jackson*, 1 S. & G. 97; *Hiorns v. Holtom*, Jur. (52) 1077, R.; S. C. 16 Beav. 259; *Ward v. Shakeshaft*, 1 Dr. & S. 269; 1 Seton Dec. (3d Eng. ed.) 378; *McKinnon v. McDonald*, 4 Jones Eq. (N. C.) 1.

¹ *Chissum v. Dewes*, 5 Russ. 29.

² 1 S. & S. 458.

³ *Ibid.*

The above rules apply to cases where there is a deficiency in the fund realized by the suit to answer all the claims upon it, but, where the fund is not in that predicament, the general rule is, that, wherever it is necessary to come to the Court, to establish a demand upon the property of persons deceased, the costs of such proceedings must be borne out of the assets.¹ Therefore, if a bill be filed by a creditor for his debt, or by a legatee for his legacy, the costs of the suit must be paid out of the testator's estate; so also must the costs of a suit to obtain the benefit of a *donatio mortis causæ*. The expenses of a suit also, by residuary legatees, or next of kin, for an account and distribution of an estate, must be defrayed out of the general estate. And it seems that, in such suits, the circumstance that the defendant has offered to the plaintiff a full inspection of his account, makes no difference; a plaintiff, in such a case, is not bound to receive and acquiesce in the mere unsupported statement of the accounting party, he has a right to have the account of the estate taken with the sanction of oaths, and all other guards against deception which a Court of Equity can supply.²

Where a bill is brought to secure and have the benefit of a contingent interest devised over, the costs must be paid out of the general assets of the testator, who by his will occasioned the difficulty;³ and it is invariably held, that, if in the course of a suit for the administration of an estate a difficulty arises upon the construction of a will, the costs occasioned by such difficulty must be defrayed out of the assets,⁴ even though the difficulty has arisen from parol evidence, introduced on the part of the defendant.⁵

¹ See *Hampson v. Brandwood*, 1 Mad. 381, 394; *Gardner v. Parker*, 3 Mad. 184.

² *Sharples v. Sharples*, M'Le. 506; S. C. 13 Pri. 745.

³ *Studholme v. Hodgson*, 3 P. Wms. 300.

⁴ This rule applies only to cases arising under wills; it does not apply where difficulties arise upon the construction of deeds, in which cases, although if the deed which gives rise to the suit be so darkly framed as to occasion fair doubts as to its construction, the Court will excuse the unsuccessful parties their costs: it will not compel the successful party to pay them out of the estate; *Hampson v. Brandwood*, *ubi supra*; see also *The Earl of Oxford v. Churchill*, 3 V. & B. 59, where the costs of an unsuccessful claim, set up on behalf of an infant to a share of a fund under a settlement, was charged, not upon the general fund, but upon that portion of the fund to which the infant was held to be entitled.

⁵ *Nourse v. Finch*, 1 Ves. jr. 362. See *King v. Strong*, 9 Paige, 94; *Smith v. Smith*, 4 Paige, 271; *Rogers v. Ross*, 4 John. Ch. 608; *Irving v. De Kay*, 9 Paige, 521.

When, however, it is said, that a legatee, filing a bill for his legacy, will be entitled to his costs out of the estate, it must be understood only as applying to those cases in which he is successful in the suit. If a person claims as legatee, and his bill is dismissed, he will not be entitled to his costs out of the testator's estate, notwithstanding there is an ambiguity in the will, which renders it necessary to apply to the Court for its construction. In such cases, however, the Court will, if the case involves considerable difficulties, occasioned by conflicting decisions and the acts of the testator, make each party bear his own costs, by ordering the dismissal to be without costs;¹ so it will, also, where the plaintiff has a fair ground for making his claim against the estate of a deceased person. Therefore, where a bill was filed, by the next of kin of a testator, against the executors for the residue, and the next of kin failed, the bill was dismissed without costs.² And where, after a verdict upon an issue, finding against the legitimacy of a person claiming a legacy as a legitimate child, a question arose as to the costs, the Court refused to give costs against him, as he had always borne the name of the family, and been received in it.³

It may be noticed here, that in a case where a bill was filed for a legacy, which had been bequeathed to an infant, and which had been more than satisfied by advances made for the infant's benefit, during his minority, and by a larger legacy bequeathed to the infant by the executor, the Court decreed in favor of the legatee, though there had been no demand for ten years after he came of age; but as it considered the demand very ungracious, it gave the legatee no costs.⁴

This, however, can only be considered as an exception to the general rule adopted by the Court, that a legatee filing his bill to recover payment of his legacy, is entitled, if he succeeds, to his costs out of the estate.

It is necessary, here, to advert to an important distinction with regard to the portion of the testator's estate out of which the costs are to be paid, for the rule is, that where a legacy, either general

¹ *Cogan v. Stephens*, Lewin on Trustees, App. 2, p. 698; and see *Boreham v. Bignall*, 8 Hare, 131.

² *Brasbridge v. Woodroffe*, 2 Atk. 69.

³ *Forbes v. Taylor*, 1 Ves. jr. 99.

⁴ *Lee v. Brown*, 4 Ves. 362.

or specific, is to be paid out of the testator's estate, and any doubt or ambiguity arises under the will, which renders an application to the Court necessary, the costs occasioned by such application are to be paid, not out of the legacy or bequest with respect to which the doubt arises, but out of the general assets not otherwise disposed of;¹ in other words, they are payable out of what is usually termed the residuary estate, although, perhaps, the term may not be quite correct, inasmuch as the residuary estate is, strictly speaking, that part of the estate which remains after payment of all legal and testamentary claims upon the estate, whether for debts, legacies or costs.²

It may here be observed, that where next of kin, or persons claiming as a class under the will of a testator, succeed in establishing their title under a decree for the administration of the estate, it is usual for them to be allowed their costs;—not their costs incurred out of doors in collecting information as to the pedigree of the party,—not the costs of private inquiry, but the costs incurred in the Judge's chambers, and generally of proceedings in the suit; and the rule prevails, whether they are made parties to the suit by supplemental bill, or whether the fund is administered, without formally bringing them before the Court upon the record.³ In such cases, if the residuary estate has ultimately to be divided amongst different classes of persons, the practice is for the costs of all the claimants to be paid out of the general estate before any apportionment is made, even though the effect of such a mode of payment is to diminish the fund of one class of claimants to an extent materially greater than the amount of costs due to that particular class.⁴

Moreover, where the particular fund which has occasioned the litigation is not part of the residue, the general rule is, that the residuary estate should bear the costs of administering the estate. Thus, where it was necessary to have the decision of the Court, as

¹ *Studholme v. Hodgson*, 3 P. Wms. 303; *Jolliffe v. East*, 3 Bro. C. C. 27; *Baugh v. Reed*, ib. 195; S. C. 1 Ves. jr. 257; *Attorney-General v. Hurst*, 2 Cox, 365; S. C. 3 Bro. C. C. 380; *sub nom.* *Attorney-General v. Winchelsea*, *Barrington v. Tristram*, 6 Ves. 249; *Pearson v. Pearson*, 1 Sch. & Lef. 12; *Bagshaw v. Newton*, 9 Mod. 288; *Nisbett v. Murray*, 5 Ves. 158, *con multis aliis*; *Smith v. Smith*, 4 Paige, 271; *King v. Strong*, 9 Paige, 94; *Irving v. De Kay*, 9 Paige, 521.

² *Eyre v. Marsden*, 4 M. & C. 231–243; *Ripley v. Moysey*, 1 Keen, 578.

³ *Hutchinson v. Freeman*, 4 M. & C. 400.

⁴ *Shuttleworth v. Howarth*, Cr. & P. 228.

to whether a legacy of 10,000*l.*, given to two sisters, was a joint bequest or in common, the costs were ordered to be paid, not out of the legacy, but out of the general assets.¹ So, where a bill was brought to secure and have the benefit of a contingent interest devised over, the costs were ordered to be paid out of the residuary estate; and where the question, whether a legacy is specific or not, the costs of determining that question have been ordered out of the general estate, in preference to the specific legacy, although the general estate was made the subject of a residuary bequest.² Upon the same ground, it was formerly held, that, by giving a legacy to an infant, the testator made it necessary to come into this Court for directions how to lay it out; and that, therefore, the costs of a bill by an infant legatee, to have the legacy secured for his benefit, must be paid out of the residue.³ Such applications have, however, been rendered unnecessary, by the 36 Geo. III. c. 52, s. 32, which, in the case of an infant, authorizes the executor to pay the legacy into Court; and in *Whopham v. Wingfield*, the Court said that, in future, the costs would not be given in such a case.⁴

The rule which throws upon the general assets the costs of litigation, as to any particular fund, will even apply in cases where the testator has directed his *testamentary expenses* to be paid out of the particular fund, the meaning of the words *testamentary expenses* being confined to the usual charges of probate, and other charges of a similar description.⁵ It will also apply, where the difficulty has arisen, not upon a bequest of personal estate, but upon a devise of real estate.⁶

It is to be observed here, that in the application of this rule no distinction exists between cases in which the residue is disposed of, and where it is not;⁷ and that where there are specific bequests and pecuniary legacies, which exhaust the whole estate so that there is no residue, the costs occasioned by the specific bequests will be thrown upon the general fund, out of which the

¹ *Jolliffe v. East*, 3 Bro. C. C. 25.

² *Nisbett v. Murray*, 5 Ves. 158.

³ *Anon. Mos.* 5; *Whopman v. Wingfield*, 4 Ves. 630.

⁴ *Ubi supra*.

⁵ *Browne v. Groombridge*, 4 Mad. 495.

⁶ *Ripley v. Moysey*, 1 Keen, 572; *Morrell v. Fisher*, 4 De G. & Sm. 422.

⁷ *Eyre v. Marsden*, 4 M. & C. 244; *Nisbett v. Murray*, 5 Ves. 149; *Howse v. Chapman*, 4 Ves. 542.

pecuniary legacies are payable.¹ Thus, in *Barton v. Cooke*,² where there were specific and pecuniary legacies, and the personal estate, after setting apart the specific legacies, was not sufficient to pay all the pecuniary legacies, so that an abatement amongst them became necessary, the costs were ordered to be paid out of the personal estate not specifically bequeathed. The rule will also prevail where property intended to be disposed of has, in the result, been declared undisposed of; there the costs will not be thrown upon the property so declared to be undisposed of, but, as in other cases, upon the general estate.³

So, where a legacy given by a will has lapsed by the death of the legatee in the lifetime of the testator, the costs will be paid out of the general fund, and not out of the lapsed legacy;⁴ and the same rule applies where the intestacy, as to part, does not arise from lapse, but from revocation of a bequest.⁵

And it makes no difference whether the property undisposed of (whether from lapse or from any other cause) was given as a specific or pecuniary bequest, or a share of the residue; in either case, the costs of the suit will not fall on the undisposed-of share, but on all the shares; thus, in *Ackroyd v. Smithson*,⁶ the costs were paid *pro ratâ*, out of the shares of the residue which the legatees took and those shares which had lapsed; and, in cases where part of the property given to a charity becomes undisposed of, from being within the Mortmain Act, it has been long settled, that the costs are paid *pro ratâ* out of the property so undisposed of and the property well bequeathed to the charity.⁷

The cases above referred to establish the principle that, where an intestacy as to part of the personal estate arises from the intention of the testator being defeated by the happening of some event,

¹ *Eyre v. Marsden*, 4 M. & C. 244; *Nisbett v. Murray*, 5 Ves. 149; *Howse v. Chapman*, 4 Ves. 542.

² 5 Ves. 461.

³ *Howse v. Chapman*, 4 Ves. 542.

⁴ *Roberts v. Walker*, 1 Russ. & M. 752.

⁵ *Cresswell v. Cheslyn*, 2 Eden, 123; *Skrymsher v. Northeote*, 1 Swanst. 571; and see *Eyre v. Marsden*, 4 M. & C. 245.

⁶ 1 Bro. C. C. 503. The printed report, however, is silent as to costs; but the direction as to costs is shown by the Registrar's book, see 4 M. & C. 245.

⁷ Per Lord Cottenham, C., in *Eyre v. Marsden*, 4 M. & C. 245; and see *Attorney-General v. Lord Winchelsea*, 3 Bro. C. C. 573; *Attorney-General v. Hurst*, 2 Cox, 364; and *Howse v. Chapman*, *ubi supra*.

or by the operation of the law, the part thus falling to the next of kin shall in his hands be subject to the same liability as to costs, *and no more*, that it would have been subject to, if the gift had taken effect; and the principle has been extended to cases where accumulations directed by a will have been declared absolutely null and void under the Thellusson Act (39 & 40 Geo. III. c. 98). Thus, in *Eyre v. Marsden*,¹ where Lord Langdale, M. R., having declared, that a direction for the accumulation of the produce of the testator's freehold and personal estate was void under the above Act, and that such parts of the accumulation as arose from the real estate belonged to the heir, directed the costs of the suit to be paid *pro rata* by the heir and personal representatives, out of the accumulations devolving upon them, Lord Cottenham, upon appeal, varied the decree, by directing the costs to be paid out of the general estate of the testator.

But although the rule is, that the costs of a litigation, in the course of administering a will, are given out of the general assets, in preference to the particular fund, yet this rule prevails only where the question arises between an individual and the executor, or persons taking the bulk of the estate; if there is no question between them, and the question is merely between the persons interested in the particular fund, when separated from the residue, the costs must come out of the particular fund.²

It is, however, only where the legacy has been separated from the general fund, that the costs of ascertaining who is entitled to it will be paid out of the legacy itself: but it is the ordinary course of the Court, where there is some legacy clearly payable, but it is uncertain who is entitled to it, to order the legacy to be paid into the bank, with liberty for any person interested in it to apply, and to proceed to a distribution of the residue of the testator's estate; in such case, any costs which may afterwards be incurred, in inquiring who is entitled to such legacy, must come out of the particular fund, for the Court will not postpone the distribution of the residue to answer the costs of such inquiry. Where, however, it is not clear that there is any legacy payable, and,

¹ *Ubi supra*, and see 2 Keen, 564; *Christian v. Foster*, 2 Phil. 166.

² *Jenour v. Jenour*, 10 Ves. 562; see also *Shaw v. Pickthall*, Dan. Exch. Rep. 92; *Duke of Manchester v. Bonham*, 3 Ves. 61; *King v. Tayler*, 5 Ves. 809. If the devisee of real estate, charged with the payment of a legacy, refuses to pay the same, the costs of the legatee's suit to recover it, will be a charge upon the real estate. *Birdsall v. Hewlett*, 1 Paige, 82.

before that point is decided, it is necessary that there should be a previous inquiry as to who is entitled in the event of its being payable, the legacy cannot be transferred into the name of the Accountant-General, till the cause comes on for further directions, and in such case the costs will be payable out of the general estate.¹ And as a general rule, if the plaintiffs in a suit relating to the construction of a will unnecessarily mix up other questions with the questions arising under the will of the testator, the costs of such part of the suit only as relate to the construction of the will, will be paid out of the general assets. Thus, where a doubt arose under a will, whether a legacy given by the testator was undisposed of, and a suit was instituted by the residuary legatees of one of the next of kin of the testator, instead of his personal representative, in the course of which questions arose between them, the costs of so much only of the suit as related to the decision upon the will were ordered to be paid out of the general assets of the original testator.²

It may be remarked that, where a party entitled either to a legacy or share of a residue, encumbers his legacy or share, or by any act of his own occasions additional expense in respect of it, beyond what is necessary for the due administration of the estate, the additional expense will be thrown upon the particular fund or portion: thus, where a plaintiff in a suit for a share of a residue, by assigning his interest and taking advantage of the Insolvent Act, had rendered two supplementary bills necessary, the additional costs were thrown on his individual share, as costs occasioned by his own act.³ And it may be stated, as a general rule, that where a fund is to be divided between several parties, and one or more of them, by charging their shares with mortgages, annuities, or other encumbrances, have contributed to swell the expense of the suit, the practice is to divide the fund in the first place, and calculate the costs of the suit with reference to each share, so that each party bears his own costs.⁴

The course of apportioning the costs amongst the different parties interested, so as to throw the costs of each party upon his own

¹ Beames on Costs, ed. 1840, p. 8; *Barton v. Cooke*, 5 Ves. 464; *Hammond v. Neame*, 1 Mad. 38; *Attorney-General v. Lawes*, 8 Hare, 33.

² *Skrymsker v. Northcote*, 1 Swanst. 566.

³ *Brace v. Ormond*, 2 J. & W. 435.

⁴ *Bassevi v. Serra*, 3 Mer. 674; S. C. 14 Ves. 313; and see *Mocatta v. Lousada*, cited *ibid*.

fund, has been adopted in many other cases where different funds have been the subject of distribution or discussion in the same suit. Thus, where the testator charged his legacies upon his real estate, and then bequeathed a legacy to a charity, whereupon a bill was filed for the general administration of the testator's estates, and another bill was filed by the heir-at-law to have the legacy bequeathed to the charity declared void ; the Court directed that the costs of the suits, so far as related to the personal estate, should come out of the personal estate, and that the costs which related to the real estate should be borne by the real estate, so that the costs of the bill, so unnecessarily filed by the heir, should fall upon the real estate.¹ Similar decrees for an apportionment of costs between real and personal estates have been made in similar cases.²

It may be mentioned, in this place, that where a *cestui que trust*, having a life interest only, is declared entitled to his costs out of the trust estate, the Court will not content itself with merely giving him a *lien* upon the corpus of the estate by the decree, leaving him to enforce it by subsequent proceedings, but it will direct an immediate sale or mortgage of a sufficient part of the estate to raise the costs : and it appears that the omission of such a provision in the decree may be the subject of a rehearing.³

SECTION IV.

*Taxation of Costs.*⁴

It has been stated,⁵ that the Court of Chancery makes a distinction which does not exist at Law, with regard to the principle of the taxation of costs, and that this distinction is marked by the term of costs "*as between Party and Party*," and costs "*as be-*

¹ Leacroft *v.* Maynard, 1 Ves. jr. 279 ; 3 Bro. C. C. 233.

² Jones *v.* Mitchell, 1 S. & S. 290 ; Dixon *v.* Dawson, 2 S. & S. 327 ; see also 1 Bro. C. C. ed. Belt, 265, n. 3 ; Walter *v.* Maunde, 19 Ves. 424 ; King *v.* Taylor, 5 Ves. 806.

³ Burkett *v.* Spray, 1 R. & M. 113 ; Mandeno *v.* Mandeno, 1 Kay, App. 1.

⁴ See Smith Ch. Pr. (2d Am. ed.) 636 *et seq.* ; 2 Barb. Ch. Pr. 336 *et seq.* ; as to what costs are or are not to be allowed, Frost *v.* Belmont, 6 Allen, 164, 165.

⁵ Ante, pp. 1487, 1488.

tween Solicitor and Client," the Court in the latter case permitting a larger proportion of expenditure to parties holding particular characters, or placed in particular situations, than in others.

With respect to the extent of the difference between the costs allowed upon one principle of taxation, and those allowed upon the other, however important in its consequences, it is not one respecting which any definite rules can be laid down.

As a general rule upon taxation, as between party and party, there is a fixed allowance for every proceeding in a suit, which is not varied to meet the circumstances of any particular case. Thus the 13s. 4d., which is allowed* as instructions for a bill, covers, *in every case*, all the trouble which a solicitor has in getting together the materials for the suit. It is also a principle to allow or disallow the costs of any proceeding entirely with reference to the result, without regard to the reason upon which such a proceeding was undertaken. Thus the costs of making or opposing a motion or petition (in the absence of any special direction to the contrary) are allowed or disallowed, in the general costs of the suit, entirely with reference to the success of the motion or opposition.¹

In costs, as between solicitor and client, the principle is to allow the party as many of the charges which he would have been compelled to pay his own solicitor, as fair justice to the other party will permit.²

It must not, however, be supposed that, in such a taxation, where the costs are to come out of the pocket of the opposite party, the party, whose costs are to be taxed, is to be allowed everything which his own solicitor might claim against him upon the taxation of his bill. "There are many charges, which are proper against the client, which it would be improper to fix upon a third party. To take one among many instances — where a defendant, by his own delay, suffers himself to be put into contempt, it is quite fair that he should bear the expense of his own neglect, but it would be very hard to take those costs out of a fund in which any other person is interested."³

In taxing costs, as between solicitor and client, two distinct principles are adopted, one, where the costs are to be paid out

¹ 2 Smith, 462, 3d ed.

² *Frost v. Belmont*, 6 Allen, 164, 165.

³ 2 Smith, 462, 3d ed.

of the general fund, the other, where they are to be paid out of the fund of the party himself. This distinction, however, is not made in the order directing the taxation, but only when the order is acted upon ; and, if it is intended that the party, whose costs are to be paid out of a general fund, should be fully indemnified against all expenses, care must be taken to have it so expressed in the order, as it will not be sufficient that the costs are directed to be taxed as between solicitor and client.

The Orders of May, 1845, give some precise regulations on the subject, inasmuch as they direct many items to be allowed upon taxation between party and party, which before were only allowed upon taxation between solicitor and client, and also they confer a more extensive discretionary power as to the amount to be allowed. According to the 120th Order of May, 1845, " Where costs are to be taxed, as between party and party, the Taxing Master may allow to the party entitled to receive such costs all such just and reasonable expenses as appear to have been properly incurred in —

The service and execution of writs, and the service of orders, notices, petitions and warrants ;

Advising with counsel on the pleadings, evidence, and other proceedings in the cause ;

Procuring counsel to settle and sign pleadings, and such petitions as may appear to have been proper to be settled by counsel ;

Procuring consultations of counsel ;

Procuring the attendance of counsel in the Master's offices upon questions relating to pleadings or title ;

Procuring evidence by deposition or affidavit and the attendance of witnesses ; and,

Supplying counsel with copies of extracts from necessary documents.

But in allowing such costs, the Taxing Master is not to allow to such party any costs which do not appear to have been necessary or proper for the attainment of justice, or for defending his rights, or which appear to have been incurred through over-caution, negligence or mistake, or merely at the desire of the party."

The 121st of the same Orders directs, " That the costs of such copies of pleadings and proceedings as have heretofore been allowed in the taxation of costs between party and party, in country

causes, are hereafter to be allowed in the taxation of costs between party and party in town causes."

By the 11th Order of June, 1854, " Expenses incurred, in consequence of affidavits being prepared or settled by counsel, are to be allowed only when the Taxing Masters shall, in their discretion, and in consideration of the special circumstances of each case, think such expenses properly incurred ; and in such case they are to be at liberty to allow the sums or such parts thereof as they may consider just and reasonable, whether the taxation be between solicitor and client or between party and party."

The above Orders and observations will suffice to convey a general outline of the distinction between costs as between party and party and as between solicitor and client.

We will now proceed to inquire in what cases the Court will direct the costs of a suit to be taxed upon either principle, or rather in what cases the Court will direct the costs of a party to be taxed as between solicitor and client, the general rule of the Court being, as before stated, that all costs are to be taxed as between party and party, except where they are specially directed to be taxed as between solicitor and client.

It may be mentioned in this place, that, where the Court has once adopted the principle of taxation as between solicitor and client in favor of a particular individual, or of a particular class, it will, in its future proceedings, wherever it becomes necessary to direct a further taxation of costs, direct them to be made upon the footing of the former taxation ; thus, if, upon the original hearing, the costs of a party have been ordered to be taxed as between solicitor and client, it will, at the hearing upon further directions, direct the subsequent costs of the same party to be taxed in the same manner, even though a different state of circumstances should appear on further consideration from that which was supposed to exist at the first hearing.¹ It may be noticed, however, that it is only where the former direction for taxation has been made at a hearing of the cause, either original or upon further consideration, that the Court will consider itself bound by it, at the subsequent hearing, and that it will not do so where the former direction as to costs has been made upon petition and by consent.²

It appears to be the general rule of the Court, that, when per-

¹ Ante, p. 1455.

² Ibid.

sonal representatives and other trustees are entitled to costs "*out of the fund*," such costs will be directed to be taxed as between solicitor and client. It is, however, in general, only in cases in which there is a fund under the control of the Court, that such a direction will be given; where there is no such fund, or a bill against the trustee is dismissed, the costs awarded to the trustee will be only the ordinary costs.¹

Thus, a person who was named in a deed as a trustee, but had not executed the deed, or in any manner accepted the trust, and who, by his answer, had altogether declined it, upon the bill being dismissed against him, was held not to be entitled to have it dismissed with costs, as between solicitor and client, but only with the ordinary costs between party and party.² In charity cases, properly instituted, it has been customary³ to allow the costs as between solicitor and client to the heir-at-law and other parties, and probably this practice will continue when the suit is in accordance with the provisions of the Charitable Trusts Act.

In suits by legatees the rule as to taxation of costs appears to be the same now as in creditors' suits.⁴

Where a bill has been filed for the general benefit of creditors and legatees, and the estate has proved insufficient, the Court has been in the habit, of late years, of giving the plaintiff his costs of the suit out of the fund realized by his exertions as between solicitor and client. The rule was adopted by Lord Lyndhurst, in *Turner v. Turner*,⁵ and has been sanctioned by Lord Brougham,⁶ by Lord Cottenham, when Master of the Rolls,⁷ and by the V. C. of England;⁸ and it equally applies where the bill has been filed by a simple contract creditor, and the specialty creditors have

¹ *Mohun v. Mohun*, 1 Swanst. 201; but see *Edenborough v. The Archbishop of Canterbury*, 2 Russ. 93.

² *Norway v. Norway*, 2 M. & K. 278; overruling *Sherratt v. Bentley*, 1 R. & M. 655.

³ *Attorney-General v. Haberdashers' Company*, 4 Bro. C. C. 178; *Attorney-General v. Tonna*, *Currie v. Pye*, 17 Ves. 462; *Moggridge v. Thackwell*, 1 Ves. jr. 464; 7 Ves. 36, 38; *Bishop of Hereford v. Adams*, 7 Ves. 324. See, however, *Whicker v. Hume*, 14 Beav. 528.

⁴ *Cross v. Kennington*, 11 Beav. 88; *Waldron v. Frances*, 10 Hare, App. 10.

⁵ Cited 2 R. & M. 687.

⁶ *Hood v. Wilson*, ib.; overruling *Young v. Everest*, 1 R. & M. 426; and *Rowlands v. Tucker*, ib. 635.

⁷ *Larkins v. Paxton*, 2 M. & K. 32.

⁸ *Tootal v. Spicer*, 4 Sim. 510; and see *Sutton v. Doggett*, 3 Beav. 9.

proved debts to an amount exceeding the value of the assets received.¹

But it is only where the fund is insufficient, that the plaintiff, in a suit of this description, will be entitled to have his costs taxed in so favorable a manner; where the fund is sufficient to pay all the debts, and to leave a surplus for the residuary legatee, the plaintiff will only have his costs as between party and party. In a recent case,² however, where, in a creditor's suit, a fund had been realized by the diligence of the plaintiff, and the assets were more than sufficient for the payment of the debts, Lord Langdale, M. R., considering it a hardship that creditors not parties to the suit should come in and reap the benefit of it, without contributing to the plaintiff's extra costs, made an order, by which it was directed that the plaintiff's costs, as between party and party, should be paid out of the fund, and that his extra costs should be paid *pro ratâ*, by all the creditors who partook of the benefit of the suit.³

Care must be taken to distinguish between expenses, which trustees may have properly incurred in the administration of the trust estate, and their costs of suit; expenses of these descriptions, though it is very right that they should be reimbursed, do not fall under the denomination of costs of the suit, even when directed to be taxed as between solicitor and client. Of this nature are cases laid before counsel for their opinion preparatory to the institution of the suit, and many other charges of that description, which, where there is a decree directing an account, a trustee would be considered entitled to, under the head of just allowances; but which, where there is no decree for an account, and consequently no opportunity of claiming just allowances, a trustee would be in danger of losing, especially in cases where the suit does not involve property out of which they can be retained, or disposes of

¹ *Barker v. Wardle*, 2 M. & K. 818; ante, p. 1498.

² *Brodie v. Bolton*, 3 M. & K. 168.

It may be remarked here, that where a creditor files a bill on behalf of himself, &c., the defendant may apply to the Court, by motion, at any time before the decree, on payment to the plaintiff of his demand and costs, and that, in such case, the plaintiff's costs will only be taxed as between party and party. *Pember-ton v. Topham*, 1 Beav. 316. If there are any other defendants to the suit, their costs must also be paid. *Ibid*.

³ *Stanton v. Hatfield*, 1 Keen, 358. See *Gaunt v. Taylor*, 2 Hare, 420; *Swale v. Milner*, 6 Sim. 572.

the whole of it, were it not that, in such cases, the Court will extend the order for the taxation of costs, as between solicitor and client, to "*charges and expenses properly incurred*" by the trustee. Under such a direction as this, the trustee may obtain all such expenses as he has properly incurred relating to the trust property, in or in connection with the suit, although they are not properly costs in the cause. The direction to tax costs, charges and expenses, will also, it is stated, be given in the case of a party interested in the fund, where they are payable out of the party's own fund.¹

The taxing of costs in the Court of Chancery is now, under the authority of the stat. 5 & 6 Vict. c. 103, entrusted entirely to officers specially appointed for the purpose, denominated "Taxing Masters."² Before the passing of the above-mentioned Act the duty devolved upon the Masters of the Court.

By the 9th Order of October, 1842, the Taxing Masters are directed to perform all the duties before that time performed by the Masters in ordinary in relation to the taxation of costs, and the powers and authorities requisite for that purpose, are by the same Order conferred upon them.

The 10th of the same Orders directs, "That all reference to the taxation of costs shall be made to the Taxing Master in rotation; or, if there has been any former taxation of costs in the same cause or matter, then to the Taxing Master before whom such former taxation has taken place, either on a reference from the Court, or upon the request of the Master in ordinary."

Moreover, by the 12th of the same Orders, in cases where the account of any trustee, executor or administrator, receiver, consignee or committee, consists in part of any bill of costs; and in cases of any proceedings under the 23d Order of 1833, (which enables the Master to adjudicate upon the costs of special applications,) or under the 47th Order of August, 1841, and in all other cases where, under any general Order, the Master in ordinary is at liberty to tax the costs of any proceeding before him in respect of any exceptions, or any creditor's charge, or otherwise, he may request the Taxing Master to assist him in taxing the costs, and on receiving such request, the Taxing Master is empowered to proceed to tax and settle such bill of costs.

¹ Farquharson v. Balfour, T. & R. 184.

² Mr. Mill's Evidence, Chanc. Rep. App. B., No. 25, p. 557.

By the 124th Order of May, 1845, "In cases where a bill or petition is dismissed with costs, or a motion is refused with costs, or any costs are by any general or special Order ordered or decreed to be paid, the Taxing Master may tax such costs without any Order referring the same for taxation, unless the Court, upon the application of the party alleging himself to be aggrieved, prohibits the taxation of such costs: and the costs to be certified by the Taxing Master are to be recovered by *subpoena*."

There are two methods in which the order as to the taxation of costs may be drawn up, — sometimes it is referred to the Taxing Master to tax the costs, and at other times the taxation is only referred to him "in case the parties differ about the same."

The practical course of proceeding for the taxation of the bill is as follows: —

The solicitor first prepares his bill, and a copy of the order under which the taxation is to take place. If there has been a former order for taxation in the cause or matter, then the subsequent taxation will take place before the same Taxing Master without a new reference. If there has been no former order upon going to the office, the name of the sitting Master will be ascertained, upon the solicitor certifying that the cause or matter has not been already referred for taxation. The clerk of the sitting Master will indorse the name of the Taxing Master in rotation upon the original order of taxation. A warrant or summons must then be taken out to be served on the parties to attend at the taxation, fixing the time for attendance.

Where the decree orders a party to retain his costs, when taxed, out of the balance in his hands, and to pay the residue into Court, if he delays to get the costs taxed, the proper course is for the other party to move that he may bring his bill of costs to be taxed within a limited time.¹

Where the direction is to tax costs, "in case the parties differ about the same," the order of proceeding is pointed out by the 76th Order of 1828, and is as follows: — "The party claiming the costs must bring the bill of costs into the Master's office, and give notice of his having so done to the other party;² and, at any time

¹ *Newsome v. Shearman*, 2 S. & S. 95.

² In *Aubrey v. Hoper*, 5 Russ. 1, it was insisted, that, by the practice as it existed before the order, the party claiming the costs ought not to carry in his bill to the Master, till he has given the other side an opportunity of examining the

within eight days after such notice, such other party shall have liberty to inspect the same, without fee, and may take a copy thereof, if he thinks fit ; and must, at or before the expiration of the eight days, or such further time as the Taxing Master shall in his discretion allow, either agree to pay the costs or signify his dissent therefrom, whereupon he shall be at liberty to tender a sum of money for the costs : but, if he makes no such tender, or if the other party refuses to accept the sum so tendered, the Taxing Master is then to proceed to tax the costs, according to the practice of the Court ; and, in case the taxed costs shall not exceed the sum tendered, then the costs of the taxation are to be borne by the other party."

The parties served with a warrant may obtain copies of the bill to be taxed. When the day arrives the parties attend with the documents in the cause, and go through the bill before the Master. A certificate of costs is then prepared and filed.

An order directing the costs of a suit to be taxed warrants the taxation up to the time of the Master's making his report,¹ and this it has been held to do, notwithstanding a reservation of subsequent costs, "not provided for by the decree," there being other costs by which these words might be satisfied.² Where subsequent costs are not intended to be given, the direction should be confined to costs up to the decree, and the question as to subsequent costs, should be reserved.³

An order directing the taxation or payment of costs by two or more parties, is joint and several, and, if one of them dies, the costs may nevertheless be taxed and recovered against the others.⁴

The plaintiffs, however numerous, can have but one bill of costs : and the same rule applies to defendants appearing by the same, by furnishing him with a copy of it ; and it was contended that the same practice ought to continue under the new order ; but the Court, after having directed a certificate, decided that there was no such practice before the order ; and consequently, that, under the new order, the party to recover the costs need not give to the other party a copy of his bill before carrying it to the Master's office.

¹ *Quarrell v. Beckford*, 1 Mad. 280 ; and see *Clutton v. Pardon*, T. & R. 301, 4.

² *Quarrell v. Beckford*, *ubi supra*.

³ *Ibid.* ; and see *Seton* Dec. 40.

⁴ *Poole v. Franks*, 1 Mol. 78 ; *Meredyth v. Hughes*, 3 Y. & J. 188 ; 2 *Smith*, Pr. 467, 3d ed.

same solicitor, however large their number or however diversified their interests ;¹ thus, if one solicitor is concerned for any number of defendants, whatever their interests may be, he is only entitled to one bill of costs for them all, although he may, in that bill, charge for separate answers of any of them, or for the employment of separate counsel for any of them at the hearing.² In such cases, however, he can charge only one term fee and one attendance in Court for all of them.³

If one or more of several defendants, defending by the same solicitor, present a petition, and the rest, having a different interest to the petitioners, cannot join in the petition, but appear upon it to consent or to submit to the order of the Court, and all are ordered to have their costs of the petition, the solicitor can only be allowed one bill of costs ; nor can he be allowed for separate attendances in Court, but only for separate briefs and separate fees to and attendance upon counsel.⁴

If a town solicitor happens to be concerned as agent for two different solicitors in the country, or if he himself is properly concerned for some defendants and as agent for others, the case is different, and he will be allowed to bring in two bills of costs ; but he must, from the beginning of the suit, keep the defences separate, and take double copies of the bill, &c., as if two solicitors were employed ; if he does otherwise, he will be allowed only one bill of costs, and the two solicitors in the country must divide the fees between them.⁵

In taxing costs, the Taxing Master is the sole judge of the fact, whether the business has been done, and of the proper charge to

¹ See *Pratt v. Bacon*, 11 Pick. 495.

² *Wendell v. Lewis*, 8 Paige, 613 ; *Miller v. Lincoln*, 6 Gray, 556. Where the defendants in a suit were very numerous, and lived at some distance from each other, and some had joined in their answers, and others had filed separate answers, the main subject of the controversy, however, being the same, viz., whether there was a partnership or joint liability between the plaintiffs and defendants, the Court directed, that in addition to one general bill of costs for the defendants, to be taxed as in an action at law, a specific sum should be taxed for each distinct answer filed to the original bill and to the amended bill. *Clark v. Reed*, 11 Pick. 446. As to costs of separate answers, where the same solicitor is concerned, see ante, p. 742.

³ 2 *Smith Pr.* 3d ed. 467. See *Davis v. McNeil*, 1 Ired. Ch. 344 ; *Houghton v. Barney*, 2 Ired. Ch. 393.

⁴ *Ibid.*

⁵ *Ibid.*

be made, and his decision upon this subject is final. It is also his duty to inquire, whether the business was required to be done; for if the solicitor negligently or ignorantly takes any unnecessary proceedings, it is the duty of the Master to protect the client from any charge in respect of such proceedings.¹

When the reference is to apportion the costs of a suit, where part of them only are given to the plaintiff, and no costs are given as to the rest, in this case the Taxing Master looks over all the folios of the bill, answers, depositions and proceedings, and only the usual fees of such folios and proceedings as relate to the matter prevailed in are allowed.² In doing this, however, the proper course appears to be, to apportion the costs of all the general proceedings in the cause, so that the party receiving the costs should have a fair proportion of the costs of each proceeding, and not merely those costs which were occasioned by the particular portion of the proceedings of which he is to have the costs. This principle was adopted in a case, where, in a suit for the administration of assets, the executor was charged with interest on the balances in his hands, and the reference was to tax the plaintiffs their costs, as to so much of the suit as sought to charge the executor with interest. The Master, in his taxation of the costs, allowed the plaintiff a portion of every general proceeding in the suit, whereupon the executor presented a petition complaining of the taxation, and insisting that he ought to have been charged with so much only of the costs of the suit as related to the question of interest; but Lord Langdale, M. R., held that the principle of taxation which had been adopted was right, and dismissed the petition with costs.³

Where one solicitor appears for three several defendants, and the bill, as to one of them, is dismissed with costs, the plaintiff can only be compelled to pay the costs of such proceedings as exclusively relate to that defendant, and one third of the costs of the proceedings taken for all three defendants.⁴ And it has been held, that where a solicitor appears in a suit for several defend-

¹ *Alsop v. Lord Oxford*, 1 M. & K. 565.

² *For. Rom.* 206.

³ *Heighington v. Grant*, 1 Beav. 228; *Hardy v. Hull*, 17 Beav. 355.

⁴ 2 *Smith's Pr.* 466, 3d ed. A defendant to a suit in Chancery, appearing by the same solicitor that is employed for other defendants, is not liable to such solicitor for more than his own share; but plaintiffs in a suit are jointly and severally liable to their solicitor for the whole costs of the suit. *Ibid.*

ants, one of whom is entitled to his costs out of the fund, and the others not, the costs of the one entitled, are only that proportion of the costs due to the solicitor, with which the solicitor, as between the co-defendants for whom he has acted, could have charged the party entitled.¹

It is to be noticed, that if, upon the taxation of costs, it should be made to appear, that the person who acted as solicitor for either of the parties had not, at the time such costs were incurred, been admitted a solicitor of the Court, the Master may disallow the whole of such costs, although they have been actually paid by the party;² and the person acting as solicitor, had been admitted an attorney-at-law, and has since been admitted a solicitor of the Court.³ And it seems that, even if the fact, that the party was not a solicitor, should be discovered after the costs have been taxed and paid, the Court will entertain a petition to have them refunded.⁴

With respect to the mode of reviewing the Master's discretion in taxing a bill of costs by any party dissatisfied with his decision, the following Orders of June, 1854, give all the information necessary upon the subject.

By the 12th Order, "Any party who may be dissatisfied with the allowance or disallowance by the Taxing Master on any bill of costs taxed by him of the whole or any part of any item or items, may, at any time before the certificate is signed, deliver to the other party or parties interested therein, and carry in before the Master an objection in writing to such allowance or disallowance, specifying therein, by a list in a short and concise form, the items or item, or parts or part thereof objected to, and may thereupon apply to the Master for a warrant to review the taxation in respect of the same."⁵

By the 13th of the same Orders, "Upon the application for such warrant, or upon the return thereof, the Taxing Master is to reconsider and review his taxation upon such objection, and he

¹ *Harmer v. Harris*, 1 Russ. 157.

² *Prebble v. Boghurst*, 1 R. & M. 744. If the Master, upon the objection being taken, refuses to disallow the costs, the Court will, upon petition, direct him to review his report, and to disallow the costs in question. *Sumner v. Ridgway*, ib. 748.

³ *Ibid.*

⁴ *Coates v. Hawkyard*, 1 R. & M. 746.

⁵ See *Hoffman v. Skinner*, 5 Paige, 526.

may, if he shall think fit, receive further evidence in respect thereof; and, if so required by either party, he is to state, either in his certificate of taxation or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto."

By the 14th Order, "Any party who may be dissatisfied with the certificate of the Taxing Master, as to any item or part of an item which may have been objected to as aforesaid, may apply to the Court by motion or petition for an order to review the taxation as to the same, and the Court may thereupon make such order as to the Court shall seem just; but the certificate of the Taxing Master shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid."¹

By the 15th of the same Orders, "Such motions and petitions are to be heard and determined upon the evidence which shall have been brought in before the Taxing Master, and no further evidence is to be received upon the hearing thereof, unless the Court shall otherwise direct."²

SECTION V.

Payment of, how enforced.

WHEN costs are ordered to be taxed and paid by *one party to another*, the Taxing Master, having taxed the costs, certifies the *quantum* to the Court; which certificate being filed, the solicitor has the option of two modes by which he may enforce payment. He may prepare and sue out³ a *subpœna* for costs, in the form pointed out by the Orders of May, 1845, which is as follows:—

¹ If a party is dissatisfied with the decision of the taxing officer upon particular items of the bill of costs, he must bring the questions before the Court, by an application on his own part, although the other party applies for a retaxation as to other items. *Rogers v. Rogers*, 2 Paige, 458. As to the retaxation of costs, see further, *Andrews v. Ford*, 2 Halst. Ch. 488.

² If a party insist upon having items included in his bill, which are not legally taxable, he will be charged with the expense of a retaxation; but if the other party also objects to items properly taxed, each party may be left to bear his own costs upon the retaxation. *Doe v. Green*, 2 Paige, 347. See *Lloyd v. Brewster*, 5 Paige, 87.

³ The method of suing out a *subpœna* for costs is the same as that of suing out a *subpœna ad respondendum*, see ante, p. 428, note.

“VICTORIA, &c.—To ———, greeting. We command you, [and every of you,] that you pay or cause to be paid immediately after the service of this writ, to ———, or the bearer of these presents, £—— costs, in a cause wherein *A. B.* [and others, *or* another, are *or*] is plaintiff [*or* plaintiffs] and *C. D.* [and others *or* another, are *or*] is defendant [*or* defendants], [*or* in the matter — as the case may be,] by our Court of Chancery adjudged to be paid by you to the said ———, under pain of an attachment issuing against your person, and such process for contempt as the Court shall award in default of such payment.

“Witness, &c.

DEVON.”

Where the Taxing Master is directed to tax the costs of the plaintiff and of a defendant, and it is ordered that the costs of such defendant, when taxed, shall be paid by the plaintiff, and that another defendant shall repay to the plaintiff the amount of the first defendant's costs, together with the plaintiff's own costs, the plaintiff cannot obtain separate *subpœnas* against the defendant who is to pay the costs, for the costs of the other defendant and for his own; but he must either get the Master to tax the costs of the defendant and his own costs, and certify the whole in one certificate, which he will do, if the plaintiff produces the receipt of the defendant for the amount of his costs; or he may have two certificates, one for his own costs, and the other for the costs of the defendant, and produce the receipt of the defendant together with the certificate at the Subpœna Office; in which case, one *subpœna* will be allowed for the amount of the two certificates.¹

The service of a *subpœna* for costs must be personal on the *party required* to pay them; if, however, he is not to be found, the Court will, on motion, make an order, allowing substituted service, as in the case of a decree.²

The service of a *subpœna* for costs is not, like a *subpœna* for any other purpose, limited to the twelve weeks after the teste of the writ;³ but it must be effected within the jurisdiction of the Court, unless there is a special order of the Court to authorize its service elsewhere. Thus, in *Hawkins v. Hall*,⁴ where a *subpœna* for costs

¹ 1 Smith's Pr. 3d ed. 592.

² See ante, p. 1068; *Danford v. Cameron*, 8 Hare, 329.

³ 16th Order, May, 1845.

⁴ 1 Beav. 73. It was held that no valid service could take place upon a person in custody upon an irregular process; *S. C.* 4 M. & C. 280.

was served upon the plaintiff at Boulogne, and he was afterwards arrested upon an attachment issuing upon that service, Lord Langdale, M. R., set the attachment aside for irregularity.

It may be observed, that where there is a *joint* order for payment of costs by *two or more persons*, the order is considered as joint *and several*, and that, in such case, if one of the individuals to pay abscond, or cannot be served, a proceeding against the other will be good.¹

So, also, if one of the parties to pay the costs dies before they are paid, or even before they are taxed, the survivors may be proceeded against, notwithstanding the parties to pay the costs were the plaintiffs, and the death of one of them has occasioned an abatement of the suit.²

It will be recollected, that, in the case of a decree or order for payment of money, if the party to receive the money does not serve it himself, it is necessary that the person who does serve it should have, and show to the party on whom he serves it, a letter of attorney from the person to receive the money, authorizing him to receive it for him;³ and, in some books of practice, it is stated that this process is necessary in the case of a *subpæna* for costs, where the person serving it is not the party to receive it.⁴ This, however, appears to be a mistake, for, as the *subpæna* directs the costs to be paid either to the person named or to *the bearer*, it is not necessary that the bearer should have any other authority to receive the costs than the writ itself.⁵

The person serving the *subpæna*, whether he be the party entitled to the costs, or "*the bearer*," must, however, at the time of service, make a demand of the amount of the costs.⁶

If the party refuse or neglect to pay the costs upon personal service and actual demand, an affidavit of the personal service, demand and refusal, or neglect, being made and filed by the person serving the process, the Clerk of Records and Writs will, where the party does not enjoy the privilege of Parliament, seal an attachment;⁷ if he is taken thereupon, a commission of sequestra-

¹ See *Ex parte* Bishop, 8 Ves. 333.

² *Meredyth v. Hughes*, 3 Y. & J. 188; and see *Michel v. Bullen*, 6 Price, 87.

³ Ante, p. 1059.

⁴ Prac. Reg. 406.

⁵ See Beames on Costs, ed. 1840, p. 167; 1 Harr. ed Newl. 194.

⁶ *Hawkins v. Hall*, 4 M. & C. 280; 1 Harr. 194; Beames's Ord. 170.

⁷ Beames on Costs, ed. 1840, p. 165.

tion may immediately issue against him, and if the sheriff return *non est inventus*, the party prosecuting the contempt is entitled either to a commission of sequestration or to an order for the Sergeant-at-arms.¹

It is to be recollected, that the process of the Court to enforce obedience to a *subpœna* for costs, against a party not entitled to privilege, like the process to enforce obedience to a decree for the payment of money, is not aailable process;² although, it seems, that if a sheriff, after taking a party upon an attachment for costs, lets him out upon bail, and, *before the return of the attachment*, retakes him, his liability will not be enforced.³

Where the party served with the *subpœna* for costs is entitled to the privilege of peerage, or is a member of the Commons House of Parliament, the method of enforcing obedience is to obtain an order as of course for a sequestration, *nisi*, and upon affidavit of personal service of such order, it is a motion of course, to make the sequestration absolute.

The course of proceeding, to enforce the payment of costs by a corporation aggregate, is the same as that to compel appearance.⁴

It is to be remarked, that the process by *subpœna* is necessary in those cases only in which *costs alone* are to be paid by one party to another. Where a debt or legacy, as well as costs, is ordered to be paid to the same person, the decree will cover the costs as well as the debt or legacy, and therefore, in such cases, a *subpœna* is unnecessary.⁵

The above methods of proceedings apply to all cases in which costs are to be recovered by *subpœna*; but it is to be observed, that some costs are not recoverable by *subpœna*. Amongst these may be reckoned the costs of contempt. The costs of contempt for want of appearance are enforced by the Clerk of Records and Writs refusing to accept the appearance unless the costs are paid; so, also, in the case of contempt by not putting in an answer, the plaintiff may refuse to accept the answer until the costs of the contempt are discharged;⁶ or if the answer has been filed, without

¹ 11th Order, August, 1841, ante, p. 1061.

² Ante, p. 1060.

³ Collard v. Hare, 5 Sim. 10.

⁴ Ante, p. 428, &c.

⁵ Beames on Costs, ed. 1840, p. 166. As the decree does not authorize payment to the *bearer*, if the *bearer* is not the person named in the writ to receive, there must be a power of attorney, ante, p. 1059.

⁶ See ante, p. 767.

payment of the costs, he may move to take it off the file for irregularity.¹ In other contempts, also, where the party is in custody, the detaining party should take care that the sheriff or other officer does not discharge the prisoner, or that he does not sanction his being discharged until he has paid the costs of contempt. The costs of amending a bill must be made before the bill can be regularly amended. The payment of the costs of exceptions submitted to is a necessary part of the submission.

In almost all other cases, however, costs payable by one party to another, are recoverable by *subpœna* or writ of execution,² and, by the 23d Order of 1833, the party to whom the costs of applications by warrant, under the 3 & 4 Will. IV. c. 94, are directed to be paid, is entitled to sue out a *subpœna* for the same.

A *subpœna* for costs formerly issued only against persons who were parties to the record.³ If costs were to be recovered against a person not a party to the record, the course of proceeding was, first to get an order *nisi* upon him to pay by a given day; and, if he did not pay by the day named, then to obtain an order that he might pay by another day, or stand committed. We have seen, however, that now the obedience of persons not parties to the record is enforced in the same manner as in the case of persons strictly parties.⁴

Besides the ancient method of recovering costs by *subpœna* or *writ of execution*, the Act for the Abolition of Imprisonment for Debt on *Mesne Process*,⁵ has provided an additional remedy by writs of *fieri facias* and *venditioni exponas*, and of *elegit*, by which costs either alone, or together with a sum of money decreed or ordered to be paid by one party to another, may be recovered from the personal or real estate of the party to pay them.⁶

The method of carrying the provisions of this Act into effect has been pointed out by the Orders of the 10th of May, 1839,⁷ in

¹ Ante, p. 786.

² See *Dodge v. Griswold*, 12 N. Hamp. 578; *Frost v. Belmont*, 6 Allen, 152, 164.

³ Anon. 14 Ves. 207.

⁴ Ante, p. 1079.

⁵ 1 & 2 Vict. c. 110. By this Act, s. 13 (rendered applicable to decrees and orders by Courts of Equity, by sect. 18), costs may be made a direct charge upon the real estates of the party to pay them in the manner there pointed out; see ante, p. 1050.

⁶ See ante, p. 1054.

⁷ Ibid.

the appendix to which Orders will be found the proper form of writs adapted to cases of costs, whether payable alone or together with a sum of money or of a sum of money with interest.

It is to be recollected, that, in any of the above cases, it is necessary that the order or decree under which the costs are to be paid, should be duly passed and entered in the manner already pointed out, at least one month before a writ of *elegit* or of *fi ri facias* can be sued out upon it, and that the date of such entry must be marked upon the order.¹

The costs also must be taxed by the Master, and the Master's certificate of such taxation filed, and a copy thereof produced to the Clerk of Records and Writs issuing the writ, together with the decree or order directing the payment.

The above methods of procuring the payment of costs apply, only, where costs are payable from one party to another; where they are payable out of the fund or estate which is the subject of dispute, the proper course, where the fund is standing in the name of the Accountant-General, is for the party having the carriage of the order to leave the same, together with an office copy of the Master's report or certificate with the clerk of the Accountant-General in whose division the fund is placed, who will prepare a check upon the Bank of England for the amount. The check is then passed through the offices and taken to the Bank of England, in the same manner as checks for the payment of money out of Court in other cases.²

Where the costs are to be paid out of a fund not in Court, or out of the estate which is the subject of litigation, no *subpoena* lies against the party in whose hands the property is, or in whom the estate is vested, but a sufficient proportion of the fund or estate will be ordered to be sold.³ A direction to this effect, where none is contained in the decree, may be obtained by motion.⁴ It is usual, however, to insert the order for a sale of the estate, for the purpose of paying the costs, in the decree or order itself, and an

¹ See ante, p. 1055.

² Smith, 3d ed. 598.

³ *Cannon v. Beely*, 1 Dick. 115; S. C. and see *Cannell v. Beeby*; Beames on Costs, App. 7.

⁴ *Cannell v. Beeby*, *ubi supra*.

omission to do so may be ground for a rehearing or appeal.¹ It has been already mentioned, that, where a tenant for life of an estate is entitled to costs out of the estate, the Court will direct an immediate sale or mortgage to raise the costs.²

It has been before stated, that where, after a bill has been dismissed for want of prosecution, the plaintiff files another bill for the same purpose, the Court will suspend the proceedings on the new bill, till the costs of the former suit have been paid, and, that it will even do so where the defendant in the second suit is executor of the defendant in the first suit ;³ the same course will also be followed by the Court where the original bill has been dismissed at *the hearing*, without prejudice to the plaintiff's filing a new bill for the same matter.⁴ It seems, however, that the Court will not make such an order if the defendant takes any step in the new cause before applying for it.⁵

It may be convenient to mention here, that the 41st Order of August, 1841, directs, "That where a defendant in equity files a cross-bill against the plaintiff in equity for discovery only, the costs of such bill and of the answer thereto shall be in the discretion of the Court, at the hearing of the original cause."

It will be observed, that, according to the strict language of this Order, the discretion conferred by it upon the Court, can only be exercised at the hearing of the original cause. The consequence of this was, that if the plaintiff in the original suit never brought his cause to a hearing, no opportunity was afforded for the exercise of the power of the Court over the costs in the cross-cause.⁶

Moreover, under the practice which prevailed before this Order issued, the defendant to a cross-bill for discovery was entitled to move for his costs immediately upon filing his answer ; so that in a case where the plaintiff in the original suit dismissed his own bill, not only was the defendant in that suit unable to get the costs of his cross-bill for discovery, but he was liable to be compelled to pay the costs of the answer to that bill.⁷

¹ See *Burkett v. Spray*, 1 R. & M. 113.

² *Ante*, p. 1508.

⁴ *Onge v. Truelock*, 2 Moll. 41.

⁶ *Skipworth v. Westfield*, 13 Sim. 265.

⁷ *Westfield v. Skipworth*, 1 Ph. 277.

³ *Ibid.* p. 1027.

⁵ *Ibid.*

The 125th Order of May, 1845, without discharging the 41st Order of August, 1841, has removed these evils, by directing that "The costs of a bill of discovery filed by any defendant to a bill for relief are to be costs in the original cause, unless the Court otherwise orders."

With respect to bills of discovery other than cross-bills, there does not seem to be anything in the recent Order to affect the previous practice, so that now as heretofore a defendant to a bill for discovery may move as of course for his costs as soon as he has put in an answer, and the time for excepting has expired.¹ Where, however, the bill prays a commission to examine witnesses as well as a discovery from the defendant, the proper time to move for the costs of the discovery is after the return of the commission, for the conduct of the defendant in examining witnesses under the commission may influence the costs.²

But in the case of a bill to perpetuate testimony, the defendant may move as of course for his costs, as soon as the witnesses have been examined or the commission executed, and before publication, upon the allegation that he did not examine any witnesses.³

¹ *Attorney-General v. Burch*, 4 Mad. 178. The general practice is, that a plaintiff, who comes merely for discovery and obtains it, shall pay the costs. *Burnett v. Sanders*, 4 John. Ch. 504; *M'Elwee v. Sutton*, 1 Hill Ch. 34; *King v. Clark*, 3 Paige, 76; *Weymouth v. Boyer*, 1 Ves. jr. 416; *Hervey v. Talbutt*, 1 Jac. & W. 197; *Fulton Bank v. N. York and Sharon Canal Co.*, 4 Paige, 127; *Dennis v. Riley*, 1 Foster (N. H.) 50. This rule was adhered to, although the defendant demurred and his demurrer was sustained only as to certain formal parts of the bill, and overruled as to the residue, and was withdrawn and the bill amended, full and proper answers having been subsequently filed. *Adams v. Porter*, 1 Cushing, 170. But a defendant, who has been previously applied to for the information sought by the bill, and has improperly refused to give it, is not entitled to costs, though he makes the discovery when sought by the bill. *King v. Clark*, 3 Paige, 76; *Burnett v. Sanders*, 4 John. Ch. 504; *M'Elwee v. Sutton*, 1 Hill Ch. 34; *Dennis v. Riley*, 1 Foster (N. H.) 50. In a case where the defendant in a bill of discovery is entitled to costs, he may move for them as soon as the answer is perfected. *King v. Clark*, 3 Paige, 76; *Dennis v. Riley*, 1 Foster (N. H.) 50. Where an officer of a corporation is necessarily made a party, for the purposes of discovery merely, if the plaintiff is compelled to pay the costs of such discovery, he may have a decree over against the other parties for such costs. *Fulton Bank v. N. York and Sharon Canal Co.*, 4 Paige, 127.

² *Banbury v. ———*, 9 Ves. 103; *Anon.* 8 Ves. 69.

³ *Wright v. Tatham*, 2 Sim. 459; *Beavan v. Carpenter*, 11 Sim. 22; *Foulds v. Midgley*, 1 V. & B. 138; and ante, p. 956.

SECTION VI.

Court Fees.

It will be convenient before concluding this Chapter on Costs, to set forth a list of the Court fees now paid at different stages of proceedings in Chancery. These fees are sometimes paid in money, but more frequently by means of stamps ; but in whatsoever manner paid, they no longer are received by the officers of the Court for their own use.

The stat. 15 & 16 Vict. c. 87, usually called the "Sutors in Chancery Relief Act," is very stringent on the subject, and the first three sections may be referred to for more precise information, should it be required.

The 5th section of the same Act, directs the several allowances then paid for copies of documents in various offices to cease, and authorizes the Chancellor to make regulations for making and delivering copies of pleadings and other proceedings, and of the documents relating thereto, and the manner in which such copies should be paid for.

Under the authority of this section, a General Order issued on the 25th of October, which it will be convenient to set forth.

It provides, with respect to copies of pleadings and proceedings : —

"In lieu of copies of pleadings and other proceedings in the Court of Chancery, and of the documents relating thereto, being made and delivered by officers of the Court at the office in which they are filed or left, copies of such pleadings, proceedings, and documents (save as hereinafter excepted) are to be made, delivered, charged and paid for according to the following regulations :¹ —

¹ By an Order of the 21st day of June, 1854 : — "I. From and after the 2d day of July, 1854, all office copies and other copies of pleadings, proceedings, and documents in the Court of Chancery shall (except in the cases hereinafter mentioned) be counted and charged for after the rate of 72 words per folio, and where such copies or any portion thereof shall comprise columns containing figures, each figure shall be counted and charged for as one word. II. From and after the 2d day of July, 1854, the charge for all transcripts of accounts made in the office of the Accountant-General shall be after the rate of 2s. for each opening of such transcript, consisting of the debtor and creditor sides of the account to be entered therein."

RULES.

- “ 1. The following copies are exempted from this Order, that is to say, office copies of proceedings filed in the Report Office; ¹ office copies of answers, pleas and demurrers; ² office copies of depositions of witnesses, and examination of parties to be made for and taken by the party on whose behalf such depositions and examinations have been taken; ³ office copies of affidavits to be made for and taken by the party filing the same; and office copies of affidavits to be taken under Order XXXVII. of 16th October, 1852.⁴
- “ 2. The party or his solicitor requiring any copy, save as hereinbefore excepted, is to make a written application to be delivered to the party by whom the copy is to be furnished, or his solicitor, with an undertaking to pay the proper charges.
- “ 3. Upon such requisition being made with such undertaking as aforesaid, copies of such pleadings, proceedings or documents, are to be made by the party or his solicitor filing or leaving the same, or who under the first rule may have taken office copies thereof.
- “ 4. The copies are to be ready to be delivered at the expiration of forty-eight hours after the delivery of such request and undertaking, or within such other time as the Court may in any case direct, and are to be delivered accordingly upon demand and payment of the proper charges.
- “ 5. The charges for all such copies are to be at the rate of 4*d.* per folio.⁵
- “ 6. Copies of bills of costs are to be made side for side, so as to correspond with the bills of costs left in the office.

¹ Any party requiring a copy of these documents must take a copy from the office.

² The plaintiffs' solicitors will have to take office copies of these documents.

³ An office copy of these documents will have to be taken by the party on whose behalf they are taken; and, with respect to affidavits, by the party filing them.

⁴ This Order is to the effect, that claimants need not take office copies of their own affidavits, but the party prosecuting the cause must take office copies of them.

⁵ By the 9th and 10th Orders of June, 1854 (ante, p. 40) provision is made for the case of persons suing *in formâ pauperis*.

- “ 7. The folios of all copies are to be numbered consecutively in the margin thereof, and the name and address of the party or solicitor, by whom the same is made, is to be indorsed thereon in like manner as upon the proceedings in the Court; and such party or solicitor is to be answerable for the same being true copies of the original, or of an office copy of the original pleadings, proceeding or document of which it purports to be a copy, as the case may be.
- “ 8. In cases of *ex parte* applications for injunctions, or writs of *ne exeat regno*, the party making such application is to deliver copies of the affidavits upon which it is granted, upon payment of the proper charges, immediately upon the receipt of such written request and undertaking as aforesaid, or within such time as may be specified in such request, or may have been directed by the Court.
- “ 9. Any party or solicitor who has taken any office copy mentioned in Rule 2, is to produce the same in Court, or at the Judge's chambers, when required for the purpose of the proceedings to which the same relate.”

With respect to the manner of making copies, the 2d Order provides: — “ That all office copies, and copies to be furnished by parties or their solicitors, shall be written on paper of a convenient size,¹ with a sufficient margin, and in a neat and legible manner, similar to that which is usually adopted by law stationers; and in the case of copies to be furnished by parties or their solicitors, unless so written, the parties or solicitors furnishing them shall not be entitled to be paid for the same.”

The 3d Order refers to the time for making copies: — “ That in case any solicitor who shall be required to furnish any such copy as aforesaid shall either refuse, or for two clear days from the time when the application for such copy shall have been made shall neglect, to furnish the same, the person by whom such application shall be made shall be at liberty to procure a copy from the office in which the original shall have been filed, in the same way as if no such application had been made to the solicitor, and in such case no costs shall be due or payable to the solicitor so making default in respect of the copy or copies so applied for.”

The 4th Order directs, “ That in case any solicitor by whom

¹ Foolscap paper, with a quarter margin, is usually required.

any such copy ought to be furnished shall neglect to do so for such two clear days as aforesaid, or for one clear day, an addition of two clear days or one clear day, as the case may be, shall be made to the period within which any proceeding which may have to be taken after obtaining such copy ought to be so taken, so that the person requiring such copy may be as little prejudiced as possible by such neglect as aforesaid."

The following Order renders it necessary that care should be taken not to demand copies unnecessarily: — "That the Taxing Master shall not allow any costs in respect of any copy so taken as aforesaid, unless the same shall appear to him to have been requisite, and to have been made with due care both as regards the contents and the writing thereof."

The 6th Order, in the first place, refers to a schedule of fees which are to be abolished, and which need not therefore be further mentioned, and then proceeds, with reference to the fees hereinafter set forth, to declare that, "the same (save as provided by the 7th of these Orders) shall be collected, not in money, but by means of stamps denoting the amount of such fees, stamped or affixed, at the expense of the parties liable to pay the fees, on or to the vellum, parchment or paper on which the proceedings in respect whereof such fees are payable are written or printed, or which may be otherwise used in reference to such proceeding."

And where any of the fees above mentioned shall be payable in respect of any matter or thing to be done by any officer, or in any office of the Court, and it shall not have been customary to use any written or printed document or paper in reference to such matter or thing, whereon the stamp could be affixed, the party or his solicitor requiring such matter or thing to be so done, shall make application for the same, by a short note or memorandum in writing, and a stamp denoting the amount of the fee so payable shall be stamped on, or affixed to, such note or memorandum."

The 7th Order prescribes the mode of proceeding when the fees are payable out of a fund in Court: — "That in all cases where the costs are directed to be paid out of a fund in Court, the fees of taxation shall not be payable by means of stamps, but shall be carried over by the Accountant-General to the credit of the Suitors' Fee Fund; and, to that intent, the Taxing Master shall in such cases certify the amount of such fees."

The 8th Order directs the manner in which the Accountant-

General is to pay the brokerage: — “ That from and after the 28th October, 1852, the brokerage which shall or may from time to time be received by the Accountant-General of the Court of Chancery shall be paid by him, on the first day of every month, or as soon after as conveniently may be, into the Bank of England, to be there placed to his credit as such Accountant-General, to the account entitled ‘The Suitors’ Fee Fund Account.’ ”¹

THE FOLLOWING FEES ARE THE FEES HENCEFORWARD TO BE COLLECTED BY MEANS OF STAMPS.

In the Judges’ Chambers.

	£	s.	d.
For every original summons for the purpose of proceedings originating in chambers	0	5	0
For every duplicate thereof	0	5	0
For every other summons	0	3	0
For every order drawn up by the Chief Clerk, made upon applications for time to plead, answer or demur, for leave to amend bills or claims, or for enlarging publication, or the period for closing evidence, or for production of documents, or applications relating to the conduct of suits or matters	0	5	0
For every other order drawn up by the Chief Clerk	1	0	0
For every advertisement	1	0	0
For every certificate or report	1	0	0
For every certificate upon the passing of a Receiver’s and Consignee’s account, a further fee in respect of each 100 <i>l.</i> received of	0	10	0

In the Masters’ Offices.

For every warrant or summons	0	3	0
For every certificate or report	1	0	0
For taking the acknowledgment of every married woman	1	6	8
For attending any Court per day by the clerk	0	14	0
For every oath	0	1	6
For every certificate upon the passing of a Receiver’s and Consignee’s account, a further fee in respect of each 100 <i>l.</i> received of	0	10	0

¹ The Accountant-General now receives a salary in lieu of brokerage, under the 19th section of 15 & 16 Vict. c. 87.

In the Registrars' Office.

For every decree or decretal order on the hearing of a cause, or on further directions; and on the hearing of a special case, including the court fee, and the charge for entry	£	s	d.
	4	0	0
For every order for transfer or payment out of Court of an amount not exceeding 200 <i>l.</i> stock or cash, or interest on stock not exceeding 10 <i>l.</i> per annum, and for every order on petition where the petition is dismissed	0	10	0
For every order for transfer or payment out of Court of an amount exceeding 200 <i>l.</i> , but not exceeding 500 <i>l.</i> stock or cash, or interest on stock exceeding 10 <i>l.</i> per annum, and not exceeding 25 <i>l.</i> per annum, and for every order on special motion not herein otherwise specified	1	0	0
For every order on the hearing of claims, pleas, demurrers, exceptions, or on petitions not herein otherwise specified, or on petitions of appeal, rehearing for injunctions, receivers, and for writs of <i>ne exeat regno</i>	2	0	0
For every office copy of a petition of appeal or rehearing	1	0	0
For every order on petition or motion of course, including the entry thereof	0	5	0
For every office copy of a decree or order	1	0	0

In the Report Office.

Upon every application for a search	0	0	6
For all office copies, at per folio	0	0	4

Affidavits.

For filing every affidavit, with or without schedules or other papers thereto annexed, including exhibits, if any	0	2	6
For the copy of every affidavit, for each folio	0	0	4
Upon every application to inspect an affidavit	0	0	6
Upon every application for the officer to attend with an affidavit or affidavits at the Lord Chancellor's, or at any of the Courts at Westminster or in London, each day	0	10	0

Upon every application for the officer to carry an original affidavit to any assizes, for each day, besides reasonable expenses of officer	£	s.	d.
	1	0	0
For every deponent, affirmant or declarant to an affidavit, affirmation or declaration sworn, affirmed or declared in London, or within ten miles of Lincoln's-Inn Hall	0	1	6
Upon any application for the officer to attend an invalid, including the attendance	0	10	0

In the Examiners' Office.

For filing interrogatories	0	7	0
For all office copies, per folio	0	0	4
For every witness sworn and examined, including oath, for each hour	0	5	0
For every witness sworn and examined abroad (besides coach-hire and reasonable expenses)	1	7	0
If more than five miles from the Examiners' office, for the first day	2	15	0
For every other day	2	2	0
For attending the Lord Chancellor or the Master of the Rolls with record, per day	0	10	0
For attending any Master at his office	0	10	0
For attending with record in any other Court or place in London or Westminster, per day	1	0	0
If in the country, per day, besides reasonable expenses	2	0	0
Upon every application to inspect depositions, including the inspection	0	3	0
Upon every application to examine copies of depositions, with record to prove on trial at law	0	5	0
Upon every application to search book for causes, including search	0	1	0
Upon every application to search book for depositions, including search	0	1	0

N. B. — These fees will shortly cease to be payable when the new system comes into operation.

In the Record and Writ Clerks' Office.

For all office copies, per folio	0	0	4
Filing every bill or information	1	0	0

	£	s.	d
For filing every claim	0	5	0
For filing every special case	1	0	0
Upon entering every appearance if not more than three defendants	0	7	0
If more than three and not exceeding six defendants . .	0	11	0
And the same proportion for every number of defend- ants.			
For sealing an attachment or distringas, for not appear- ing or answering	0	8	0
For every certificate	0	4	0
For every copy of a bill or claim to be served	0	5	0
For every writ of summons, distringas or subpœna . . .	0	5	0
For filing and entering duplicate of every Judge's sum- mons	0	5	0
For stamping every copy thereof	0	5	0
For sealing every other writ	1	0	0
For every oath, affirmation, declaration or attestation upon honor	0	1	6
For examining every copy, or part of a copy of a set of interrogatories, and marking same as an office copy . .	0	5	0
Upon every application for a search for a record, and for searching	0	2	0
Upon every application to inspect a record, and for in- specting the same	0	5	0
Upon every application to inspect exhibits, if occupied not more than one hour	0	5	0
If more than one hour, per diem	0	10	0
Upon every application for the officer's attendance in courts of law per diem, and for his attendance, be- sides reasonable expenses of the officer	1	0	0
Upon every application for the officer's attendance in a Court of Equity, per diem	0	10	0
For examining and signing enrolments of decrees and orders	3	0	0
For filing caveat against claim to revive, or against de- cree or order or enrolment	0	5	0
For filing supplemental statement or statement for re- vivor	0	10	0
For office copies of depositions taken before Examiner, at per folio	0	0	4

In the Taxing Masters' Office.

For every warrant or summons, but not more than one order or summons is to be issued on one bill or set of bills, unless the Taxing Master shall think it necessary to issue a new warrant or summons . . .	£	s.	d.
On signing every report and certificate . . .	0	3	0
Upon the Master's certificate of every bill of costs, as taxed, where the amount shall not exceed 20 <i>l</i> . . .	1	0	0
Upon every additional 20 <i>l</i> ., or fractional part thereof, a further fee of . . .	0	10	0
For every oath, affirmation or attestation upon honor . . .	0	10	0
	0	1	6

In the Lord Chancellor's Principal Secretary's Office.

On all attendable petitions, appeals, rehearings and letters missive . . .	1	0	0
On all non-attendable petitions . . .	0	10	0
On a matter-of-course order on a petition of right . . .	0	10	0
On an order for a commission on a petition of right . . .	1	0	0

In the Office of the Secretary at the Rolls.

On every petition set down for hearing, to include the fee on hearing . . .	1	0	0
On the petition for every order of course . . .	0	7	0
On the admission of every solicitor . . .	1	17	0

The SECOND SCHEDULE to which the foregoing Order refers : —

In the Office of the Accountant-General.

1. For preparing English power of attorney with affidavit, exclusive of stamp duty . . . 0 3 6
2. For preparing foreign power of attorney without affidavit . . . 0 3 0
3. For special power of attorney . . . 0 5 0
4. For copies of accounts, debtor and creditor's side, per folio, as to be explained by General Order . . . 0 0 3
5. Upon every application for a search . . . 0 5 0

(Signed) ST. LEONARDS, C.

The following Order of the 3d of December, 1852, prescribes the practice with respect to stamps:—

I. That the Commissioners of Inland Revenue do prepare stamps impressed upon adhesive paper, of the amounts following, that is to say, threepence, fourpence, eightpence, one shilling and fourpence, one shilling and sixpence, two shillings and sixpence, and two shillings and eightpence.

II. That such stamps shall be affixed by the parties requiring to use the same on the vellum, parchment or paper, on which the proceeding in respect whereof such stamps may be required is written, printed or engrossed, or which may be otherwise used in reference to such proceeding.

III. That every officer of the Court of Chancery who shall receive any document to which a stamp shall be so affixed, shall immediately upon the receipt thereof obliterate or deface such stamp, by impressing thereon a seal to be provided for that purpose, but so as not to prevent the amount of the stamp from being ascertained, and no such document shall be filed or delivered out until the stamp thereon shall be obliterated or defaced as aforesaid.

A notice was affixed in the Registrar's office on the 3d of November, 1852, to the following effect:—

1. The amount of the stamps will be marked by the Registrar's clerk on the minutes.

2. The Registrar's stationer will supply the stamps when the order is copied, and will return the papers to the Registrar's seat, but retain the order.

3. When the solicitor applies at the Registrar's seat for the order, his papers will be delivered to him, and he will be referred to the Registrar's stationer, from whom he will receive an order on paying the stamp.

4. Where printed forms are used, the Registrar's clerk will tell the solicitor what form is used, and the solicitor will obtain the stamped form from the Registrar's stationer, and leave it with the papers. — N. B. Unless the order is taken away, and the stamp paid for within three weeks from the day on which the order is bespoken, it will be cancelled, and the stamp recovered as spoiled; and in case the solicitor shall want the order recopied, he will be required to pay the stationer's charge for recopying.

The following Order of the 4th of December, 1852, completes the subject:—

I. When no certificate of the taxation of a bill of costs shall be required, the *ad valorem* duty directed by the Order of the 25th day of October to be levied by stamps on the Master's certificate shall nevertheless be due, and shall be payable on the amount of the bill as taxed, or on the amount of such part thereof as may have been taxed; and the solicitor is in such case to cause the proper stamp (the amount thereof to be fixed by the Master) to be impressed on or annexed to the bill of costs.

II. The fees hereunder specified shall hereafter be collected, not in money, but by means of stamps denoting the amount of such fees, stamped or affixed, at the expense of the parties liable to pay the fees, on or to the vellum, parchment, or paper, on which the proceedings in respect whereof such fees are payable, are written or printed, or which may be otherwise used in reference to such proceedings.

1st. In the Registrar's Office.

For Orders made by a Judge in chambers, drawn up by the Registrar, the like fees as by the Order of the 23d of October, 1852, are directed to be taken by the chief clerks to the Judges for Orders drawn up by such chief clerks.

2d. In the Record and Writ Clerks' Office.

	£	s.	d.
For amending every record of any bill . . .	0	10	0
For amending every office copy thereof . . .	0	5	0
Copies of documents left as exhibits, per folio . . .	0	0	4

(Signed) ST. LEONARDS, C.

In addition to these Orders, concerning the fees to be taken in the public offices, the following Order of the 22d of April, 1850, concerning solicitors' charges on claims, is material.

Solicitors are entitled to charge and be allowed the following fees:—

	£	s.	d.
For instructions to sue or defend . . .	0	6	8
For instructions for every claim . . .	0	13	4
For preparing and filing a claim . . .	2	2	0

	£	s.	d.
For preparing a writ or summons	0	13	4
For each writ after the first	0	6	8
For engrossing claims and writs, per folio	0	0	6
For parchment as paid.			
For each copy of writ to serve, per folio	0	0	4
For the brief for counsel to move for leave to file claim, exclusive of a copy of the claim for counsel and the Court	0	10	0
For the brief and instructions to counsel on the hearing, exclusive of any necessary copies	1	0	0
For taking instructions to appear, and for entering ap- pearance —			
For one or more defendants, if not exceeding three	0	13	4
If exceeding three, and not more than six, an additional sum of	0	6	8
If exceeding six, for every number not exceed- ing three, an additional sum of	0	6	8
For settling minutes, passing and entering an order on hearing, the same charges as on a decretal order.			
For entering a caveat	0	6	8
For procuring certificate of the caveat	0	6	8
For term fee as in a suit.			

And also all such fees as by the present practice of the Court they are entitled to, save such as are varied or rendered unnecessary by these present Orders.

And by a General Order, the 2d of February, 1855, "When the preparation of any case or matter to lay before the Judge in chambers on a summons shall have required and received from the solicitor such extraordinary skill and labor as materially to conduce to the satisfactory and speedy disposal of the business, and therefore shall appear to the Judge to deserve higher remuneration than the ordinary fees, the Judge may allow to the solicitor, by a memorandum in writing expressly made for that purpose, and signed by the Judge, specifying distinctly the grounds of such allowance, such further fee, not exceeding ten guineas, as in his discretion he may think fit, instead of the fee of one guinea authorized in such a case by the Order of the twenty-third day of October, one thousand eight hundred and fifty-two."

CHAPTER XXXI.

OF REHEARINGS AND APPEALS.

SECTION I.—*General Rules.*

WHERE a party feels himself aggrieved by a decree or decretal order of the Court, there are three modes by which he may have it either reversed or altered : viz. — 1. By a Rehearing before the same or another Judge of the Court ; 2. By an Appeal to the House of Lords ; and 3. By a Bill of Review.

As a rehearing, by the Lord Chancellor, or the Lords Justices, of a decree or order made by the Master of the Rolls or a Vice-Chancellor, is in fact an appeal ; and, as many of the rules applicable to appeals to the House of Lords, are applicable to those proceedings in common with rehearings, the present section will be devoted to the consideration of those rules and principles which are common to both proceedings ; and it is to be premised, that, as the term “*appeal*” may be applied to both, it will, where used in the following pages, include rehearings in Chancery as well as appeals to the House of Lords, except in those instances in which the distinction shall be specifically pointed out.

It is to be recollected, that, except in the instances already pointed out, a decree or order made by consent of counsel, or *ex parte*, cannot be the subject of appeal.¹

¹ *Stewart v. Forbes*, 12 Jur. 968 ; *Sturgeon v. Hooker*, 2 Phil. 289 ; *Atkinson v. Manks*, 1 Cowen, 691 ; *Ringgold's Case*, 1 Bland, 5, 12 ; *ib.* 18, 270 ; *Coster v. Clarke*, 3 Edw. Ch. 405 ; *French v. Shotwell*, 6 John. Ch. 564 ; *Decoster v. La Farge*, 1 Paige, 574 ; *Monell v. Lawrence*, 12 John. 521. With reference to what orders are deemed to be upon consent, see *Davis v. Chantis*, 10 Jur. 975, and C. P. Cooper's Reports, temp. Lord Cottenham, Vol. 1, p. 42. An appeal will not lie from a decree entered by default. *Kane v. Whittick*, 8 Wendell, 219. As to appeals from decrees entered *pro confesso*, see *Rowley v. Benthuyzen*, 16 Wendell, 369 ; *Hoye v. Penn*, 1 Bland, 35 ; *Ringgold's Case*, *ib.* 5, 12 ; *Shye v. Llewellen*, *ib.* 18 ; *McKim v. Thompson*, *ib.* 270 ; *Murphey v. Amer. Life Ins. and Trust Co.* 25 Wendell, 249 ; *Tripp v. Cook*, 26 Wendell, 243 ; *Hunt v. Strong*, 15 Vermont, 377.

In Ohio, under the Act 1831, giving an appeal “from any final sentence or decree,” an appeal was allowed from a decree in the Common Pleas, taken by consent of parties. *Brewer v. Connecticut*, 9 Ohio, 189. See *Morris v. Davies*, 5 Clark & Fin. 163.

This rule, however, does not apply to cases in which, upon a demurrer for want of parties, the demurrer is allowed, with liberty to the plaintiff to amend: in such cases the plaintiff, by acquiescing in the undertaking to amend, does not preclude his right of appeal.¹

A party dissatisfied with a decree, will not prejudice his right to appeal, or have the cause reheard, by consenting to an order consequential upon the decree.² The general rule of the Court is, that an appeal or a rehearing does not suspend the proceedings under a decree.³

It is not necessary that the person who appeals should be actually a party to the record, provided he has an interest in the question which may be affected by the decree or order appealed from; even creditors coming in under a decree have been held entitled to rehear the cause, though not parties to the bill, because the decree affected their interest;⁴ but a person not a party to the record must first obtain permission from the Court below.⁵ In *Osborne*

¹ *Ledbetter v. Long*, 4 M. & C. 286.

² *Wood v. Griffith*, 1 Mer. 35; *Turner v. Turner*, 2 De G., Mac. & Gor. 28.

³ *Buck v. Fawcett*, 3 P. Wms. 242.

⁴ *Giffard v. Hort*, 1 Sch. & Lef. 409.

⁵ *Berry v. Attorney-General*, 2 Mac. & Gor. 16. A party who has no interest in the subject-matter of the suit, or whose interest has ceased since the commencement of it, cannot bring an appeal. *Reid v. Vanderheyden*, 5 Cowen, 719; *Mills v. Hoag*, 7 Paige, 18; *Idley v. Bowen*, 11 Wendell, 238; *Steele v. White*, 2 Paige, 478. A mere interest in the costs gives no right of appeal in respect to any other matter. *Reid v. Vanderheyden*, 5 Cowen, 719. No person is authorized to appeal from a decree unless he is injured or aggrieved by it, and a party who is injured or aggrieved by one part of a decree only, cannot by appeal call in question another part of the decree, in which he is not interested. *Cnyler v. Moreland*, 6 Paige, 273; *Idley v. Bowen*, 11 Wendell, 227; *Hone v. Van Schaick*, 7 Paige, 221. And in general no person can bring an appeal unless he was a party, or represents a party in the matter in the Court below; although he may have an interest in the question. *Ludlow v. Greenhouse*, 1 Bligh, (N. S.) 17; *Steele v. White*, 2 Paige, 478. But it is not necessary that a party should have appeared in the Court below, to entitle him to an appeal. *Hyslop v. Powers*, 9 Paige, 322. It seems that a person interested in proving a will, may make himself a party to an appeal from the decision of the Court below, although he was not a party to the proceedings in that Court. *Foster v. Tyler*, 7 Paige, 48. Any one of several against whom a decree is rendered, may appeal from it. *Johnson v. Johnson*, 1 Dana, 366. And a defendant, whose interest is separate from that of the other defendants, may appeal without the others. *Forgay v. Conrad*, 6 Howard (U. S.) 201.

v. Usher,¹ the same principle is admitted; and it is held, that if the right of a remainderman, or of any person entitled to the estate in any way, is bound by the decree, he must have a right to appeal from it, as well as the person against whom it was made.²

Upon this ground, it has been determined, that a tenant in tail in remainder expectant, after the determination of a prior estate tail (who would not be a necessary party to a suit affecting the entailed estate, against the prior tenant in tail), has a right to appeal against the decree in that suit.

It has also been determined, by the House of Lords, that a purchaser under a decree, though no party to the suit, may appeal from an order setting aside a bidding, and ordering a new sale;³ and it has been held, that a creditor coming in, and having his claim disallowed, may appeal from the order disallowing the exceptions.⁴

It is to be observed, however, that it is only in cases in which the interest of the party wishing to appeal will be bound by it, that a rehearing or appeal will be permitted, at the instance of an individual not on the record; in no other case can he have ground to complain of the decree or order.⁵

A party who is poor is entitled to prosecute or defend an appeal or a rehearing *in formâ pauperis*, in the same manner that he has a right to sue and be sued in that character.⁶

In the House of Lords a poor party, whether appellant or respondent, may be admitted *in formâ pauperis*. To obtain such admission, the pauper must present a petition, accompanied by an affidavit of his poverty, and also a certificate to the same effect from the minister and churchwardens of the parish where the party is resident.

If the pauper be in London, no affidavit in writing, or certificate, will be necessary; as, in that case, the party makes oath of his or her poverty in person at the bar of the House.⁷

¹ 6 Bro. P. C. ed. Toml. 20.

² Giffard *v. Hort*, *ubi supra*.

³ Ryder *v. Earl Gower*, 6 Bro. P. C. 306.

⁴ Winchelsea *v. Garety*, 1 M. & K. 253.

⁵ *Ibid.*

⁶ Bland *v. Lamb*, 2 J. & W. 402; ante, p. 37. In Bolton *v. Gardner*, 3 Paige, 273, it was held that an appeal cannot be prosecuted by the appellant *in formâ pauperis*, but he must give security for costs. And if he succeeds, he may have *divers* costs on the appeal, although he sue as a poor person in the Court below.

⁷ Palmer's Prac. II. L. 84.

The 25th Order of October, 1842, directs, "That any solicitor signing any petition of rehearing or appeal, or any consent to a petition, or any notice of motion, or any proceeding or application to be made by a pauper, shall thereby become subject to all the liabilities to which the sworn clerks have heretofore been subject in respect of such matters."

The grounds upon which a party may appeal from a decree or order of the Court, or have it reheard, are as numerous and various as the cases themselves, and any attempt at pointing them out would be hopeless. In fact, wherever the Court is called upon to determine a question of law or of fact, the decision may be the subject of a rehearing or appeal, by any party who considers himself aggrieved by it.¹ The only case in which a party cannot

¹ There can be no appeal from an order concerning the mere practice of the Court, or course of proceeding in the cause. *Rowley v. Van Benthuyssen*, 16 Wendell, 369, 371, 378, 379; *Tripp v. Cook*, 26 Wendell, 150, 155. No appeal lies from a mere initiatory order; see *McCredie v. Senior*, 4 Paige, 378; *Buel v. Street*, 9 John. 443; *Trustees of Huntington v. Nicoll*, 3 John. 566; nor from an order directing a sale of the property in litigation, and that the money be brought into Court; *Chapman v. Hammersley*, 4 Wendell, 173; *McKim v. Thompson*, 1 Bland, 172; nor from an order refusing a rehearing of a motion for instructions to a Master, as to the examination of a witness; *Williamson v. Hyer*, 4 Wendell, 170; nor from a decree ordering an account; *Berryhill v. McKee*, 3 Yerger, 157. In *Robertson v. Bingley*, 1 McCord Ch. 351, it is remarked by Nott J. in delivering the opinion of the Court, "I think there is no rule which ought more rigidly to be adhered to, than that an appeal ought not to be allowed from an interlocutory order. There is some difficulty in defining in terms so precise as is desirable, what shall be considered such interlocutory order as to preclude an appeal. But I think it may be laid down as a general rule, that an order which does not put a final end to the case, nor establish any principle which will finally affect the merits of the case, nor deprive the party of any benefit which he may have at a final hearing, ought to be considered an interlocutory order, from which no appeal ought to be allowed." See *Berryhill v. McKee*, 3 Yerger, 157; *Gibson v. Randolph*, 2 Munf. 310; *Allen v. Belcher*, 2 Hen. & Munf. 595; *Daniels v. Taggart*, 4 Gill & John. 311; *Hagthorp v. Hook*, 4 Gill & John. 279; *Richardson v. Jones*, 3 ib. 163; *Roberts v. Salisbury*, ib. 425. See the observations of Mr. Justice Bronson on this subject in *Rowley v. Van Benthuyssen*, 16 Wendell, 369, 371, 378, 379. If an order for an attachment contains a final determination or adjudication that the defendant is in contempt, he may appeal therefrom. *McCredie v. Senior*, 4 Paige, 378. An order directing an issue is a proper subject of an appeal. Ante, 1091, and note to this point. An appeal will lie from an order refusing to open proofs in a cause, for the purpose of re-examining a witness who, since his examination, has disclosed facts material and pertinent to the

appeal from the decision of the Court, is where the determination complained of is merely the result of the exercise of discretion on the part of the Judge, in a case where the matter was fairly a subject for the exercise of discretion ; in such cases, the practice of the Court will not allow an appeal from the discretion of one Judge to that of another.¹

Upon this ground it is, that the Courts have adopted the rule, that there can be no rehearing or appeal upon the question of costs.² The foundation of this rule is clearly stated by Lord Hardwicke, in *Owen v. Griffith*,³ viz., “to prevent vexation and trouble ; for as cases in Equity often depend on abundance of circumstances, about which, as the reason of mankind might differ, it would (*i. e.* if the question of costs might be laid open generally) create perpetual appeals.” The operation of the rule, however, is strictly confined to cases in which costs are to be paid by one party to another, and do not form any part of the relief sought by the bill, and it is liable to exception, where the costs are

issue, which he did not disclose when on examination. This decision proceeds on the ground that the order appealed from affected the merits of the cause. *Beach v. Fulton Bank*, 2 Wendell, 225. An appeal lies from an order of the Court refusing to dissolve an injunction, and awarding costs against the defendants. *McVicar v. Wolcott*, 4 John. Ch. 510. So from an order granting an injunction. *Simpson v. Hart*, 14 John. 65 ; *Martin v. Dwelly*, 7 Wendell, 11. See *Hoyt v. Gelston*, 13 John. 140. An appeal will lie to the Chancellor from an order of a Vice-Chancellor, made subsequent to a final decree in the cause. *Tripp v. Vincent*, 8 Paige, 176. An application for a rehearing must usually state some reason which would constitute a good ground for a new trial at Common Law. *Hunter v. Marlboro*, 2 Wood. & Minot, 168. See *Baker v. Whiting*, 1 Story, 218.

¹ See *Stewart v. Forbes*, 1 Mac. & Gor. 137 ; *Tripp v. Cook*, 26 Wendell, 150 ; *Rogers v. Hosack*, 13 Wendell, 319 ; *Rowley v. Benthuyssen*, 16 Wendell, 369, 371, 378, 379 ; *Owings v. Worthington*, 10 Gill & John. 283 ; *Scott v. Crawford*, 10 Gill & John. 379 ; *Merriam v. Barton*, 14 Vermont, 501.

² A rehearing or appeal is not granted for costs only, except in special cases. *Travis v. Waters*, 1 John. Ch. 48 ; *Eastburn v. Kirk*, 2 John. Ch. 17 ; *Ashby v. Kiger*, 3 Rand. 165 ; *Rogers v. Holly*, 18 Wend. 350 ; *Lewis v. Wilson*, 1 McCord, Ch. 210 ; *McMillan v. Eldridge*, Harp. Eq. 260 ; *Lyles v. Lyles*, 1 Hill Ch. 76, 92. It is otherwise where a party is entitled to costs as a matter of strict right. *Buloid v. Miller*, 4 Paige, 473 ; *Winslow v. Collins*, 3 Paige, 88. A writ of Error will not lie to reverse a decree for costs only ; though if a decree be opened as to other points, it may be reformed also in the matter of costs. *Randolph v. Rosser*, 7 Porter, 249 ; *Hunt v. Lewin*, 4 Stew. & Port. 138.

³ 1 Ves. 250 ; S. C. Amb. 520 ; see *Wirdman v. Kent*, 1 Bro. C. C. 140 ; 2 Dick. 594 ; *Williams v. Begnon*, cited *ib.*

payable out of a fund, or are chargeable upon an estate, or are part of the relief to which a party is entitled, and the facts of the case distinctly appear upon the face of the proceedings themselves; so that it is not necessary, in determining the question of costs, upon the appeal, to enter into any investigation of the merits.¹ And this principle has always prevailed, for in the case of *Owen v. Griffith*,² above cited, Lord Hardwicke entertained an appeal by an incumbrancer, who had brought his bill to compel the payment of his charge, to whom the Judge below had refused his costs, although he had given him his principal and interest; holding, that an incumbrancer upon an estate for a just debt has a lien upon the estate for his costs, as well as his demand; and that, therefore, the appeal, although for costs, affected the merits of the case.³

The same distinction was acted upon by Lord Lyndhurst, in *Bushett v. Spray*,⁴ and was much considered and approved of in *Taylor v. Southgate*,⁵ *Marsden v. Eyre*,⁶ and in *Angell v. Davis*; ⁷ in the last of which cases Lord Cottenham alluded to the three following facts, any one of which he held would have been sufficient to sustain the appeal: 1st. The bill prayed that the defendant might restore the property in question, and pay the costs, asking the payment of the costs, by way of special relief; 2d. The case was one in which the proceedings themselves, without going into the details of the transaction, furnished all the information necessary for the purpose of determining the question; and, 3dly. It was not one of personal costs, in which the Court had ordered one party to pay them, but a case in which the Court had directed them to be paid out of a particular fund.

In a more recent case Lord Cottenham held, that as a party interested in a fund might appeal from a decree directing costs to be paid out of that fund, so persons personally ordered to pay

¹ *Angell v. Davis*, 4 M. & C. 360; *Whalley v. Lord Suffield*, 12 Beav. 402; *Winslow v. Collins*, 3 Paige, 88.

² *Ubi supra*.

³ See Lord Cottenham's judgment in *Angell v. Davis*, 4 M. & C. 363; and *Jenner v. Jenner*, 10 Ves. 562; *Taylor v. Popham*, 15 Ves. 72; *Chappell v. Purdy*, 2 Phil. 227.

⁴ 1 R. & M. 113; and see *Corporation of Rochester v. Lee*, 2 De Gex, Mac. & Gor. 427.

⁵ 4 M. & C. 203.

⁶ *Ibid.* 231.

⁷ *Ibid.* 360.

costs might appeal from the decree, on the ground that the costs ought to be paid out of the fund.¹

Another exception to the general rule as to costs is afforded by a case² in the House of Lords, which, although made upon the hearing of an appeal from the Court of Session in Scotland, may be cited as applicable to all cases, English as well as Scotch. In that case it was held, that though an appeal for costs only will not lie when costs are in the discretion of the Court, yet where the Court is directed, by an Act of Parliament, to give costs, it is a proper subject of appeal, if they are not given according to the requisition of the Act.

The above instances form the only exceptions, which have as yet been acknowledged, to what may be considered as the general rule of the Court, that there can be no rehearing or appeal for costs, a rule which is very strictly adhered to; so much so, that the Court will not permit it to be evaded, by coupling the appeal for costs with another ground of appeal, which is unfounded, for the mere purpose of giving color to the appeal for costs. Thus, where a rehearing was on the ground that a defendant, charged by the decree with the payment of a sum of money, ought also to have been charged with interest and costs, the Court was of opinion, that the decree was correct as to interest, which ought not to have been given; it was thought also, that the decree was wrong in not charging the defendant with the costs, nevertheless the decree was affirmed. "They did not think the claim of interest was frivolous; but, as it was unfounded, the costs were the only thing in question ultimately."³

It must not, however, be assumed, from the case last quoted, that in all cases where the appeal for costs is coupled with other grounds of appeal, the Court will, if it affirms the decree upon the other grounds, refuse to interfere upon the question of costs; on the contrary, many cases have occurred in which decrees have been varied as to costs, though affirmed on every other point.⁴ The rule, as to this, is very distinctly laid down by Lord Lynd-

¹ *Bagot v. Bagot*, L. C. July, 1840, MSS.

² *Tod v. Tod*, 1 Bligh, N. S. 639.

³ *Williams v. Begnon*, Beames on Costs, App. No. 10; see, also, *Wirdman v. Kent*, 1 Bro. C. C. 140, S. P.

⁴ See *Jenour v. Jenour*, 10 Ves. 662; *Squire v. Pershall*, 2 Bro. P. C. 396; *Pitt v. Page*, 1 Bro. P. C. 1; *Wekett v. Raby*, 2 Bro. P. C. 386; *Maguire v. Maddin*, ib. 393; *Lewis v. Smith*, 1 Mac. & Gor. 417.

hurst.¹ "If a party appeals, having a substantial ground of appeal and a fair question to agitate, and brings in the question of costs along with it, he may succeed with respect to the costs, though he does not succeed in the substantial ground of appeal; but if a point is brought forward as a ground of appeal, which, on the slightest consideration, appears to have no substance, it would be too much to vary the decree as to costs. A point is not to be put forward as a ground of appeal merely for the purpose of covering an appeal on the question of costs."

It may be mentioned here, that a party cannot be allowed to appeal *piecemeal*, i. e., he cannot appeal from part of a decree by one petition, and afterwards appeal from another part by another petition. The rule is, that if a party appeals from a part of a decree, he admits the remainder to be correct.²

It is an established rule, that an order for a rehearing or an appeal does not stop the proceedings under the decree, or order appealed from, without special order of the Court;³ therefore, if

¹ Attorney-General v. Butcher, 4 Russ. 181.

² Norbury v. Meade, 3 Bligh. 261.

³ Beames's Order, 265; see Gwynn v. Lethbridge, 14 Ves. 585; Waldo v. Caley, 16 Ves. 206; Willan v. Willan, ib. 216. Admitting this now to be the rule in England, in the case of Green v. Winter, 1 John. Ch. 80, 81, the Chancellor declares the rule in New York to be different, and that there "an appeal does, in the first instance, stay proceedings *on the point appealed from*, and that if the party wishes to proceed, notwithstanding the appeal, he must make application to the Chancellor for leave to proceed." "The difference, then," the Chancellor remarks, "between the English practice and ours, is, that by the former the plaintiff must apply for an order to stay the proceedings; but, here the defendant must apply for leave to proceed." See Halsey v. Van Amringe, 4 Paige, 279; Gregory v. Dodge, 3 Paige, 90. By the Laws of New York, 1839, p. 292, § 3, amending the act relative to trial by jury and the taking of testimony in Chancery, it is declared that an appeal from any decision, or order of the Chancellor, either in awarding or refusing an issue, shall not stay proceedings in the cause pending the appeal; unless specially directed by the Chancellor or Vice-Chancellor before whom the cause is pending.

In Massachusetts, upon an appeal from a final decree, all proceedings under such decree shall be stayed, and such appeal be thereupon pending before the full Court, who shall hear and determine the same, and approve, reverse, or modify, the decree appealed from, as circumstances may require. Genl. Stat. c. 113, s. 8.

An appeal from an interlocutory decree made by a single justice shall not suspend the execution of the decree of the single justice, nor transfer to the full

a bill is dismissed with costs, the defendant may, notwithstanding an appeal, proceed to recover his costs.¹

So, also, it has been held, that the circumstance of an appeal depending, is not a reason against the plaintiff filing a supplemental bill for the purpose of carrying it into effect; and where the plaintiff filed such a supplemental bill, apprehending that he had not sufficient parties before the Court, and the defendant demurred, alleging as a ground that the appeal was not determined, the demurrer was overruled.²

The Courts, however, are very unwilling to suspend the execution of decrees, and will not do so except in cases where there is danger of the object of the appeal being defeated, before the appeal can be heard.³ Where that is the case the Court will suspend the execution of a decree or order pending an appeal; thus, where the object of a demurrer is to take the opinion of the Court upon the liability of a party to make the discovery required by the bill, the Court will suspend proceedings to enforce an answer pending the appeal from an order overruling the demurrer,⁴ though it will not suspend the execution of an order for the production of documents pending an appeal from the order.⁵

So, also, where there would be danger of irreparable mischief.⁶ In cases of injunctions, for instance, and still more in orders dissolving injunctions, an appeal ought almost always to be permitted Court the entire cause, or any matter therein, except the question whether the interlocutory decree appealed from, shall be affirmed, reversed, or modified. Genl. Sts. Mass. c. 113, s. 10.

¹ *Archer v. Hudson*, 8 Beav. 321; *Tyson v. Cox*, 3 Mad. 278.

² *Woodward v. Woodward*, 1 Dick. 33; *Attorney-General v. Munro*, 12 Jur. 318.

³ How far an appeal shall operate as a stay of proceedings in Equity is a matter regulated in a great degree by, and is very much within, the discretion of the Court of Chancery. *Ringgold's Case*, 1 Bland, 15; *Messonier v. Kauman*, 3 John. Ch. 66; *Barrow v. Rhineland*, ib. 123; *Riggs v. Murray*, ib. 160. See *Green v. Winter*, 1 John. Ch. 80, 81. And the Court may, notwithstanding the appeal, allow the party to proceed to enforce his decree. *Messonier v. Kauman*, 3 John. Ch. 66; *Barrow v. Rhineland*, ib. 123; *Riggs v. Murray*, ib. 160; *Green v. Winter*, 1 John. Ch. 80, 81.

⁴ *Wood v. Milner*, 1 J. & W. 636; *The King of Spain v. Machado*, 4 Russ. 560. See however the judgment of the Lord Chancellor in *Garcias v. Ricardi*, 1 Phil. 498.

⁵ *Walburn v. Ingilby*, 1 M. & K. 61.

⁶ See *Wood v. Griffith*, 19 Ves. 550; *Way v. Foy*, 18 Ves. 452; *Powell v. Hopson*, 12 La. Ann. 615; *Johnston v. Johnston*, 13 La. Ann. 581.

to stay execution;¹ upon this ground, likewise, where the Court has directed the sale of property, it will suspend the sale,² or where property of a perishable nature is ordered to be delivered up, it will direct security to be given for the amount of the property.³ And so where a specific performance of an agreement for a sale has been decreed, it will suspend the execution of the conveyance till after the appeal.⁴

It seems from the recent cases, that it is the duty of the Court to exercise its discretion according to the circumstances of each particular case,⁵ and no general rule can be laid down upon the subject.⁶

Thus, though the effect of an order was to remove a stop placed on a large sum of money which had been impounded in the Court of Common Pleas, and to enable the defendant to obtain uncontrolled possession of the fund, Lord Brougham refused to suspend the operation of the order till the hearing of the appeal, because the granting of such an order would be in effect deciding the matter the other way.⁷

The Court also has refused to suspend the distribution of a fund by a trustee for charitable purposes, pending an appeal, unless there is something in the situation of the party to make the distribution, as to pecuniary means, authorizing an inference that, if he should thereafter be found to have made a wrong distribution, he would not be able to furnish the means of setting it right.⁸ So, also, where a legacy was ordered to be paid out of Court, and the decree was appealed from, the Court allowed it to be paid

¹ See *Walburn v. Ingilby*, 1 M. & K. 61.

² *Nerot v. Burnand*, 2 Russ. 56.

³ *Ibid.*

⁴ *Gwynne v. Lethbridge*, 4 Ves. 58; and see *Roberts v. Totty*, 19 Ves. 446; *Meade v. Norbury*, 4 Pri. 322. In Massachusetts, if an appeal is taken from a final decree, the Justice, by whom such decree was made, may make such orders for the appointment of receivers, and of injunction or prohibition, or for continuing the same in force, as are needful for the protection of the rights of parties, until the appeal is heard by the full Court; subject, however, to be modified or annulled, by the order of that Court on motion, after the appeal is taken. Genl. Sts. c. 113, s. 9.

⁵ *Mayor and Corporation of Gloucester v. Wood*, 3 Hare. 154; 1 Phil. 493.

⁶ *Walburn v. Ingilby*, 1 M. & K. 61; *Stainton v. Chadwick*, 3 M. & G. 343.

⁷ *The King of Spain v. Machado*, cited 1 M. & K. 85, n.; *Corporation of Gloucester v. Wood*, 1 Phil. 497.

⁸ *Waldo v. Caley*, *ubi supra*.

out, notwithstanding the appeal, but required the party receiving it to give security for its repayment, if the decree should be reversed.¹

In like manner, where a decree was obtained by an equitable mortgagee for the payment of principal, interest and costs, within a fixed time, in default of which the estate was to be sold, the Court refused to suspend the execution of the decree, but gave six months on the defendant's bringing the money into Court, consenting to a Receiver, and paying the interest and costs, the plaintiff undertaking to repay if the decree should be reversed.²

The Court will never suspend proceedings under the decree, on the ground that if they are prosecuted, the parties will, if the decree is reversed, be put to unnecessary expense.³ Thus it is not the habit of the Court to suspend the taking of an account.⁴

With respect to the proper method of obtaining the suspension of proceedings pending an appeal, the 46th Order of 1828, directs, "That every application to stay proceedings, upon any decree or order which is appealed from, be made first to the Judge who pronounced the decree or order."⁵

It is conceived, however, that this order does not affect the practice in cases of appeals to the House of Lords, and that the party may still, as before, apply for a stay of proceedings against the decree so appealed from, either to that House or to the Court below.⁶

The costs of a special application of this nature, where it does not succeed, always follow the judgment.⁷

¹ *Way v. Foy*, 18 Ves. 452. See *Suisse v. Lord Lowther*, 2 Hare, 438; *Swift v. Grazebrook*, 3 Mac. & Gor. 6; *City Bank v. Bangs*, 4 Paige, 285; *Amer. Ins. Co. v. Oakley*, 9 Paige, 496.

² *Monkhouse v. The Corporation of Bedford*, 17 Ves. 380.

³ The appellant, however, upon a petition of rehearing, is always required to give an undertaking to pay the respondent all such costs as the Court shall award in respect of any proceedings had since the decree or order; *Price v. Dewhurst*, 4 M. & C. 282; *Corporation of Gloucester v. Wood*, 1 Phil. 497.

⁴ *Nerot v. Burnard*, 2 Russ. 56.

⁵ Before this Order the application could only be made to the Appellate Court; *Macnaghten v. Boehm*, 1 J. & W. 48; see, also, *Huguenin v. Baseley*, 15 Ves. 180; *Gwynn v. Lethbridge*, 14 Ves. 585. It is presumed, that the Order as well as the one which follows it, relating to new trials of issues, applies to the office and not to the person of the Judge, see ante, 1113.

⁶ See *Huguenin v. Baseley*, 15 Ves. 180; and *Ord. Dom. Pro. ibid.* 184.

⁷ *Waldo v. Caley*, 16 Ves. 305; *Willan v. Willan*, *ibid.* 216.

If the order appealed against is one which directs the transfer of stock, or payment of money out of Court, and it is wished to prevent the transfer or payment being made pending the appeal, immediate notice of the appeal should be given to the Accountant-General, who, upon such notice, will be justified in delaying to comply with the order till there has been time for the appellant to make a special application to the Court for a stay of proceedings.¹

SECTION II.

Of Rehearings and Appeals in the Court of Chancery.

UNTIL recently, rehearings in the Court of Chancery were necessarily either before the same Judge or before the Lord Chancellor; but now, under the 14 & 15 Vict. c. 83, the Lords Justices of the Court of Appeal in Chancery and the Lord Chancellor constitute the Appellate Court in Chancery. It is not, however, necessary that the Lord Chancellor should sit together with the Lords Justices. "All the jurisdiction, powers and authorities of the Court of Appeal may be exercised either by one only of the Judges appointed under the Act and the Lord Chancellor, sitting together, or by both of the Judges so appointed, sitting apart from the Lord Chancellor, either in his absence or during the same time as he is sitting in such Court, and the Lord Chancellor may also, by himself, exercise all the jurisdiction he had before the Act."

Upon the application of the Lords Justices, the Lord Chancellor usually sits with them, and thereby constitutes a full Court.

By sect. 10, an appeal lies from the decision of the Court of Appeal to the House of Lords, in the same cases as formerly an appeal existed from the Lord Chancellor to the same tribunal.

When, therefore, a party is dissatisfied with a decree or order which has not been enrolled, the proper course, when it cannot be rectified in the manner already pointed out,² is to apply by petition to the Lord Chancellor for a rehearing.³ This may be done

¹ *Ferguson v. Tadman*, 1 R. & M. 331.

² *Ante*, p. 1025.

³ See *Coleman v. Franklin*, 26 Georgia, 368. Rehearings in Equity are allowed in the United States Courts only where some plain omission or mistake has

whether the decree or order was at the hearing of the cause, or upon a plea or demurrer. The same rule prevails when the order is made upon a petition, in which case the proper course is to apply by petition of rehearing in the same manner as upon a decretal order. Orders made upon motion are not precisely subjects for a rehearing, but a motion may be made to the Court of Appeal for the purpose of varying or discharging an order made upon motion.

By the 8th section, "The said Court of Appeal, and the Master of the Rolls, and the Vice-Chancellors, and each of the said jurisdictions, may sit with the assistance of any Judge of either of her Majesty's Courts of Common Law at Westminster, upon the request of the Lord Chancellor, if any such Common Law Judge shall find it convenient to attend upon such a request."¹

The decision of the majority of the Judges, and the Judges of the Court of Appeal, shall be taken and deemed to be the decision of the said Court; and if the Judges of the Court be equally divided in opinion on any cause or matter brought before the Court by way of Appeal, the decree or order appealed from shall be taken and deemed to be affirmed by the Court of Appeal.

It appears that, when once a case has been decided by the Court of Appeal, however constituted, it will not be reheard before the same Court in another form; but, when no decision has been given, a rehearing before the full Court may be obtained.²

It is to be observed, however, that a decretal order made on motion, such as an order in a foreclosure suit under the statute, cannot be discharged on motion.³

been made, or where something material to the decree is brought to the notice of the Court which had been before overlooked. *Jenkins v. Eldredge*, 2 Story C. C. 299. "It has been the constant habit of the Supreme Court of the United States, to refuse rehearings of any cause, after it has once pronounced its own judgment, whatever might be the conflicts in the evidence, or the differences among the Judges themselves, as to the merits of the controversy." Per Story J., in *Jenkins v. Eldredge*, 3 Story C. C. 305. Where a rehearing is sought on the ground of newly discovered evidence, after an interlocutory decree, the Court will grant such a rehearing upon the filing of a supplemental bill, if the evidence is of such a nature as to entitle the party to relief upon a bill of review, or a supplemental bill in the nature of a bill of review, after a final decree, but not otherwise. *Baker v. Whiting*, 1 Story C. C. 218; *Jenkins v. Eldredge*, 3 Story C. C. 307, 308.

¹ *Hay v. Willoughby*, 9 Hare, 30.

² *Blann v. Bell*, 2 De Gex, M. & G. 775.

³ *Cadle v. Fowle*, 1 Bro. C. C. 515.

A rehearing ought never to be applied for where the defect, in the decree or order, is one which can be remedied by any of the methods before pointed out, and it is to be observed, that, as it will not be permitted after enrollment, so it cannot be obtained till the decree or order has been passed and entered.¹

A rehearing can only take place for the purpose of altering the decree upon grounds which existed at the time when the decree was pronounced. Where, therefore, the object is not to correct the decree, but to remedy a grievance consequent upon it, resulting from circumstances *ex post facto*, and not making part of the case, as it originally stood, a rehearing will not be permitted.²

By 15 & 16 Vict. c. 80, s. 60, the Lord Chancellor may, within six weeks after delivering up the great seal, give in to the Registrar a written judgment, signed by him, in any case which has been fully heard and is standing for judgment before him at the time of his resignation.

It has been the principle, that a cause heard before the Lord Chancellor, may be reheard before the Lord Chancellor or his successor in office;³ and, on the same principle, it would seem that it is within the discretion of the Court of Appeal, as now constituted, to hear a case a second time.

If it has been heard before any of the other Judges, it may be reheard before the Judge who heard it. If it is reheard either before the Lord Chancellor or the Lords Justices, it is generally termed an appeal, although, in fact, it is only a rehearing.

The Master of the Rolls cannot rehear a decree or order of the Lord Chancellor, unless specially authorized so to do, nor of a Vice-Chancellor; and it has been held that the Master of the Rolls has no authority to discharge or alter an order made by a Vice-Chancellor, even though made *ex parte*.⁴

¹ Robinson v. Taylor, 1 Ves. jr. 44; Taylor v. Popham, 15 Ves. 72.

² Bowyer v. Bright, 13 Price, 316; Horne v. Barton, 39 Eng. Law & Eq. 458. The fraud of a mortgagee in preventing payment of a mortgage, and in suppressing competition at the foreclosure sale, is not a ground for a petition for a rehearing. Hurlburd v. Freelove, 8 Wis. 537.

³ Taylor v. Popham, 15 Ves. 72.

⁴ Shirley v. Earl Ferrars, Law J. 1836, 200; see, also, George v. Watmouth, *ubi supra*.

The result of the statute, creating two additional Vice-Chancellors,¹ is, that no rehearing can take place before a Vice-Chancellor of any decree or order made by the Lord Chancellor, unless under a special authority, nor can a Vice-Chancellor rehear any matter in which an order or decree has been made by any other Vice-Chancellor, or by the Master of the Rolls.

The Court seldom allows more than one rehearing, whether the second hearing was before the Judge who heard the cause originally, or before the Court of Appeal. It must not, however, be understood that the power of the Court to direct a rehearing before enrolment is limited to one only, the practice of doing so is only a general, not an inflexible rule;² and there are many cases in the books in which it has been departed from.³

But, although this has been the rule of the Court, with regard to two rehearsings by the Lord Chancellor, and probably will continue so as to the Court of Appeal as now constituted, cases are not wanting in which the Court has allowed a cause heard and reheard by the Court below, to be reheard again before the Lord Chancellor.⁴

It may be stated, therefore, as the rule of the Court, that there is no positive restriction with regard to the number of rehearsings; that the granting or refusing of a rehearing is in the discretion of the Court;⁵ but that, according to the general course of practice, one rehearing of a case, where the application has been sanctioned by the signature of two counsel, in the manner required by the rules of the Court, whether before the Judge who heard it or before the superior Judge of the Court, is merely a matter of course, the Court giving such credit to the opinion of the counsel who sign the petition that the cause ought to be reheard, as to order it

¹ 5 Vict. c. 5.

² Per Lord Eldon, *Waldo v. Caley*, 16 Ves. 214; see, also, *For. Rom.* 183.

³ See *Noel v. Robinson*, 1 Vern. 90; *Lady Falkland v. Lord Cheney*, 5 Bro. P. C. 476; *Parker v. Dee*, 2 Ch. Ca. 200; *Eyton v. Eyton*, 4 Bro. P. C. 149; all which cases are cited in Mr. Hargrave's argument, in *Fox v. Mackreth*, 1 Harg. Jur. Arg. 351; see, also, 2 R. & M. 703, in which all the subsequent cases on the subject are collected and referred to; see, also, *Fox v. Mackreth*, 2 Cox, 159.

⁴ *Pickering v. Lord Stamford*, 2 Ves. jr. 272, 581; 3 Ves. jr. 332, 492; *Brown v. Higgs*, 8 Ves. 561.

⁵ *Mills v. Banks*, 3 P. Wms. 8. Where there had been one rehearing, a second rehearing was granted before another Chancellor, at the instance of the other party. *Land v. Wickham*, 1 Paige, 256.

to be set down ;¹ this, however, is not the case, after a cause has been already reheard before the appellate tribunal ; in such a case, a second rehearing will not be permitted, unless leave should have been previously granted by the appellate tribunal, upon a special application for that purpose.²

And this rule applies, whether the decree upon the first rehearing had the effect of overruling, or of affirming the original decision, and is now so well recognized, that, in the recent case of *Moss v. Baldoch*,³ Lord Lyndhurst directed a petition of appeal to be taken off the file for irregularity, because it had been presented without special leave after one rehearing.

There can be no rehearing of a decree or order of the Court after it has been enrolled,⁴ but till enrolment, it is not, as we have seen, a record of the Court, and may be altered upon a rehearing ;⁵ an enrolment, however, by one defendant, of a decree dismissing the plaintiff's bill, will prevent the cause being reheard at the instance of another defendant.⁶ Where there has been no enrolment, until recently there was no limitation as to the time within which a rehearing might be obtained, but now, by the 1st Order of the 7th of August, 1852, "No appeal from any decree, order, or dismissal, or any rehearing of the case in which such decree, order, or dismissal is founded, shall be allowed, unless the same is set down for hearing, and the requisite notice thereof duly served, within five years from the date of any such decree, order, or dismissal respectively." ⁷ Under the 6th of the same Orders, "The Lord

¹ *Cunyngham v. Cunyngham*, Amb. 89, 91 ; *Attorney-General v. Brooke*, 18 Ves. 325.

² *Byfield v. Provis*, 3 M. & C. 437 ; *Deerhurst v. The Duke of St. Albans*, 2 R. & M. 702. See *Wilcox v. Wilkinson*, 1 Murph. 11 ; *Overton v. Bigelow*, 10 Yerger, 48 ; *Haywood v. Marsh*, 6 Yerger, 69.

³ 1 Ph. 118.

⁴ Ante, p. 1029 ; *Robinson v. Lewis*, 2 Jones Eq. (N. C.) 25. There is no proceeding, under the practice in Massachusetts, such as the signing and enrolling of a decree in the English Court of Chancery ; but what is equivalent thereto is the entering and recording of a decree. After a decree has been entered and become a matter of record, there can be no rehearing, on motion or petition for the purpose of correcting an alleged error which involves the merits of the case. *Clapp v. Thaxter*, 7 Gray, 384, 385 ; *Thompson v. Goulding*, 5 Allen, 81.

⁵ Ante, p. 1029.

⁶ *Gore v. Purdon*, 1 Sch. & Lef. 234.

⁷ In *Haywood v. Marsh*, 6 Yerger, 69, it is held that a petition for a rehearing must, according to Chancery rules, be filed at the same term in which the decree is pronounced. *Overton v. Bigelow*, 10 Yerger, 48. So in Illinois. *Delahay v.*

Chancellor, either sitting alone or with the Lords Justices, or either of them, shall be at liberty, when it shall appear to him, under the peculiar circumstances of the case, to be just and expedient, to enlarge the periods for a rehearing on an appeal, or for an enrolment.”¹

A rehearing may be obtained after the decree has been carried into execution ;² and we have seen that, after the trial of an issue, the Court has permitted a petition for a rehearing of the order directing an issue, to come on for hearing, at the same time as a motion for a new trial of the issue ;³ and after the trial of an issue, the Court has permitted a rehearing of the original decree directing the issue. So also, where the Court, by decree, directed the bill to be retained, with liberty to the plaintiff to bring an action, which he did, and failed, the Court permitted the cause to be reheard ; although it was objected, that the plaintiff, having acted under the decree himself, by bringing the action, could not be heard to dispute the propriety of it.⁴

A petition for a rehearing is intituled in the cause, and if the cause has been heard before the Master of the Rolls, and it is wished to have it heard again before him, it must be addressed to the Master of the Rolls. If the cause was heard by a Vice-Chancellor, and it is intended to have it reheard by the same Judge, the petition must be addressed to the Lord Chancellor, praying that it may be reheard by such a Vice-Chancellor. If it has been heard before either the Master of the Rolls or a Vice-Chancellor, and the object is to appeal from his decision to that of the Court of Appeal, it must be addressed to the Lord Chancellor.

McConnel, 4 Seam. 156. In Vermont an application for rehearing must be made, and notice served upon the adverse party, within twenty days from the rising of the Court which pronounced the decree. *French v. Chittenden*, 10 Vermont, 127. See *Jenkins v. Wild*, 14 Wendell, 539 ; *Tyler v. Simmons*, 6 Paige, 127 ; *Farley v. Farley*, 7 Paige, 40 ; *Barclay v. Bowen*. ib. 245 ; *North Amer. Coal Co. v. Dyett*, 4 Paige, 273 ; *Eldridge v. Howell*, ib. 457 ; *Strike v. McDonald*, 2 Harr. & Gill, 191 ; *Townsend v. Townsend*, 2 Paige, 413 ; *Owings v. Owings*, 3 Gill & John. 1 ; *Smith v. Smith*, 1 Paige, 301 ; *Fulton Bank v. New York and Sharon Canal Co.*, 4 Paige, 127 ; *Boyd v. Vanderkemp*, 1 Barb. Ch. 273.

¹ As to the time for enrolments, see ante, p. 1029, and see *Townley v. Bedwell*, 15 Beav. 79.

² Rehearings in Equity after a decree are not a matter of right, but rest in the sound discretion of the Court. *Daniel v. Mitchell*, 1 Story C. C. 198 ; *Dexter v. Arnold*, 5 Mason, 303.

³ *White v. Lisle*, 3 Swanst. 351 ; ante, p. 1114.

⁴ *Brophy v. Holme*, 2 Moll. 1.

One petition cannot seek the rehearing of orders made in different suits, though the parties in both suits are the same. Thus, where two bills were filed by the same plaintiff, against the same defendant, and the defendant put in a plea to one and a demurrer to the other, which both came on for argument on the same day, and two separate orders were made, allowing them with costs; whereupon the plaintiff presented a petition of appeal, complaining of both the orders;¹ Lord Cottenham considered it a valid objection to the petition, that it embraced several orders in separate suits.

With respect to the form of the petition of appeal, the 50th Order of August, 1841, directs "That in any petition of rehearing of any decree or order made by any Judge of the Court, it shall not be necessary to state the proceedings anterior to the decree or order appealed from, or sought to be reheard."

It was usual, before this Order, for the petition shortly to state the facts of the case, as they appeared in the pleadings; and it was not irregular for it to set forth the grounds insisted upon in the answer, against making the decree.² The Order does not seem to have prohibited this practice, but to have left it to the discretion of the counsel by whom it is prepared, to make it a vehicle for a restatement of the case, or not, as he may think it most convenient. As, however, the petition is usually considered as a mere foundation upon which the Chancellor's fiat issues, and is seldom or ever read in Court, in general any restatement of the case must be unnecessary. It is clear that it must not state any matters which do not appear in the pleadings, or the statement of which is not warranted by them.³ If any order of the Court has been made since the decree, for the purpose of carrying its provisions into effect, it should be stated; and the circumstance of such an order having been made by consent will not prejudice the appellant's right to have the cause reheard.⁴

Where the petition is improperly framed, *e. g.*, if it make a different case from that on which the decree was made, or intro-

¹ *Boys v. Morgan*, 3 M. & C. 661.

² *Wood v. Griffith*, 19 Ves. 550.

³ *Ibid.*; and *Nevinson v. Stables*, 4 Russ. 210.

⁴ *Wood v. Griffith*, *ubi supra*; *Turner v. Turner*. 2 De G., Mac. & Gor. 28. A rehearing of a bill of foreclosure will not be ordered, when it appears from the petition that another decree would be rendered for the same amount. *Hurlburd v. Frelove*, 3 Wis. 537.

duce representations which were not made in the Court below, the Court will, on application by motion, order it to be taken off the file, with costs, the deposit to go in part of costs.¹ It seems, however, that it will, on such an occasion, introduce into the order a proviso, that it is to be without prejudice to the appellant's presenting another petition in more regular form.²

It is not necessary that a petition for a rehearing should state the reasons why the party presenting it is dissatisfied with the original decree or order; but it usually states, in a general manner, that he is aggrieved by it, or by part of it; and prays that the cause, &c., may be reheard, and either that the decree may be reversed, or that it may be altered in such points as are objected to.³

A certificate must be annexed to every petition for a rehearing, signed by two counsel, certifying "that they conceive that the cause is proper to be reheard." This is required in order to guard against the abuse of the right to appeal, by the pledge of counsel that the case is fit to be reheard.⁴

The counsel who sign the certificate are usually those who were concerned in the original hearing, or at least one of them; and "such credit is given by the Court to their opinion that the cause ought to be reheard, that it will, in general, order the cause to be set down" as a matter of course.⁵

¹ Wood v. Griffith, *ubi supra*.

² *Ibid*.

³ It is irregular and an infraction of the rule of the Court in Florida, to accompany the petition with a written argument and the citation of authorities. Smith v. Croom, 7 Florida, 180.

The 88th Equity Rule of the United States Courts requires, that every petition for a rehearing shall contain the special matter or cause on which a rehearing is applied for; shall be signed by counsel, and the facts therein stated, if not apparent on the record; shall be verified by the oath of the party, or of some other person. No rehearing shall be granted after the term at which the final decree of the Court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the Court, in the discretion of the Court. In New Jersey, the petition must be signed by two counsel, except in cases submitted without argument, when it shall be sufficient if signed by one counsel. Chancery Rule xix. § 1. See Emerson v. Davies, 1 Wood. & Minot, 21, 23; *Ex parte* Terry, Rice Ch. 1; Wiser v. Blachley, 2 John. Ch. 488.

⁴ Monkhouse v. The Corporation of Bedford, 17 Ves. 380; *Ex parte* Terry, Rice Ch. 1; Faussett v. Ormsby, 1 Irish Eq. 388; Emerson v. Davies, 1 Wood. & Minot, 22, 23.

⁵ Per Lord Hardwicke, in Cunyngham v. Cunyngham, Amb. 91; see Attorney-

But although the general practice is for the Lord Chancellor to order the cause to be set down for rehearing, as a matter of course, upon the certificate of counsel, he may, if he has any doubt upon the subject, order the petition itself to come on for hearing, before he orders it to be set down.¹

The proper course is, where there is any irregularity in the petition, for the party respondent to make a special application to the Court, by motion, to have the petition taken off the file; to which may be added, if the order for setting down the petition has been

General v. Brooke, 18 Ves. 325; *East India Company v. Boddam*, 13 Ves. 423; *Wilcox v. Wilcox*, 1 Ired. Ch. 36; *Cotton v. Parker*, 1 Sm. & M. Ch. 125. The mere certificate of counsel has no such effect in obtaining a rehearing in the United States. *Jenkins v. Eldredge*, 3 Story C. C. 299, 304; *Emerson v. Davies*, 1 Wood. & Minot, 21; *Field v. Schieffelin*, 7 John. Ch. 256; *Land v. Wickham*, 1 Paige, 256; *Decarters v. La Farge*, 1 Paige, 574.

¹ 2 Cox, 159. Rehearings in Equity, after a decree, are not a matter of right, but rest in the sound discretion of the Court. *Daniel v. Mitchell*, 1 Story C. C. 198; *Land v. Wickham*, 1 Paige, 256; *Travis v. Waters*, 1 John. Ch. 48; *Field v. Schieffelin*, 7 ib. 256. Except in cases provided for by the rules of the Court. *Land v. Wickham*, 1 Paige, 256; *Harrison v. Hall*, 1 Hopk. 112. If a motion for rehearing is made for delay, it will be refused. *Land v. Wickham*, 1 Paige, 256. A rehearing will not be granted on account of the discovery of new evidence or new matter; *Mead v. Arms*, 3 Vermont, 148; nor because the importance of the testimony has only been discovered since the decision; if the party had it in his power to ascertain its importance before the hearing, and has neglected to do so, and obtain the testimony; although the justice of the case might be promoted by it. *Provost v. Gratz*, 1 Peters C. C. 364. See *Daniel v. Mitchell*, 1 Story C. C. 198; *Hinson v. Pickett*, 2 Hill Ch. 357; *Baker v. Whiting*, 1 Story C. C. 218; *Robinson v. Sampson*, 26 Maine, 11; *Jenkins v. Eldredge*, 3 Story C. C. 299. A rehearing will generally not be allowed where the newly-discovered evidence is merely cumulative upon the litigated facts already in issue. *Baker v. Whiting*, 1 Story C. C. 218; *Dunham v. Winans*, 2 Paige, 24; *Jenkins v. Eldredge*, 3 Story C. C. 299, 310, 311. Nor for the purpose of contradicting a witness examined by the adverse party. *Dunham v. Winans*, 2 Paige, 24. Nor to enable a party to release a witness declared incompetent on the hearing, and to re-examine him. *Ib.* Error of judgment or mistake of law by counsel, as to the pertinency or force of evidence, furnishes no ground for a rehearing. *Baker v. Whiting*, 1 Story C. C. 218; *Jenkins v. Eldredge*, 3 Story C. C. 299, 316; *Dennett v. Dennett*, 4 N. Hamp. 535. See *Decarters v. La Farge*, 1 Paige, 574. It is not enough, on an application for a rehearing, to show that injustice has been done, but it must be shown that it has been done under circumstances which authorize the Court to interfere. *Walsh v. Smyth*, 3 Bland, 9.

If a party voluntarily absents himself from the hearing, he cannot appeal from a decree rendered in his absence; and if his absence was accidental, his remedy is by a petition for a rehearing, and not by an appeal. *Townsend v. Smith*, 1 Beasley (N. J.) 350.

made, an application, that the order may be discharged with costs, which was the course pursued in *Wood v. Griffith*.

The certificate annexed to the petition having been duly signed by counsel, the petition and certificate must be left with the secretary of the Judge to whom it is addressed. Together with the engrossment of the petition a copy of the decree or order appealed against, and a fair copy of the petition itself, is left with the secretary.¹

The fiat of the Lord Chancellor, upon this petition, is usually to the following effect:—"Upon the petitioner, or his solicitor, consenting to pay such costs (if any) as the Court shall think fit to award, in respect of any proceedings had since the said decree (or order), and upon his depositing 20*l.* with the Registrar in a week, let this appeal be set down to be heard next after the rehearings and appeals already appointed."

The petition having been answered, the undertaking required by the fiat to be signed by the petitioner, or his solicitor, must be added to it, and signed accordingly.² The object of the Court, in requiring this undertaking, was discussed before Lord Cottenham; and it appears, that it is intended to provide for the reimbursement to the respondent, of all such expenses as he may be put to, in prosecuting the decree or order appealed against.³ It was con-

¹ In New Jersey, a copy of every petition for a rehearing shall be served on the opposite party, with a notice of presenting the same. Chancery Rule xix. § 2. Notice must be given in Vermont. *French v. Chittenden*, 10 Vermont, 127.

² The 16th Order of 1842 directs, that "The signing of petitions of rehearing and appeal," shall be one of the duties hereafter to be performed by the solicitors in place of the clerks in Court.

³ An appeal granted becomes a nullity upon a failure to give the appeal-bond as required. *Wickliffe v. Clay*, 1 Dana, 589. The execution of the decree will not be stayed, if no bond be given. *Bryson v. Petty*, 1 Bland, 183. It is not necessary that an appeal bond should be conformable in all respects to the statute, but only that it be sufficient in substance, so as to secure to the party, for whose benefit it is given all his rights. *Foster v. Tyler*, 7 Paige, 48. Where a suit was against one as executor, and in his own right as legatee, and a decree was made against him personally, he was required, on appealing, to give a bond with surety. *Ersine v. Henry*, 7 Leigh, 378. See *Shearman v. Christian*, 1 Rand. 73; *Wilson v. Wilson*, 1 Hen. & Munf. 15; *Sadler v. Green*, ib. 26. For other decisions upon appeal bonds, their form, effect, &c., see *Clark v. Clark*, 7 Paige, 607; *Ridabock v. Levy*, 8 Paige, 197; *Tyler v. Simmons*, 6 Paige, 127; *Foster v. Tyler*, 7 Paige, 48; *North Amer. Coal Co. v. Dyett*, 4 Paige, 273; *City Bank v. Bangs*, ib. 285; *Potter v. Baker*, ib. 290; *Rogers v. Paterson*, ib. 450; *Eldridge v. Howell*, ib. 457; *Braxton v. Morris*, 1 Wash. 381; *Brown v. Math-*

tended, by the counsel for the respondent, that the intention of it is to create a liability, on the part of the party signing it, to all the costs of the appeal, but Lord Cottenham was of opinion, that the undertaking is required for the purpose above stated, and that it extends and applies only to such costs as may have been incurred in the prosecution of the decree.¹

The undertaking having been signed by the petitioner, or his solicitor, the next step is to obtain from the Registrar the order for setting down the cause for rehearing. For this purpose, the petition, with the Lord Chancellor's fiat, and the undertaking annexed, must be taken to the Registrar, who, upon payment of the deposit,² will file the petition, and draw up the order, which must be passed and entered in the usual way.

This money was received by the senior Registrar, and used to be paid by him to the solicitor of the party to whom the deposit is ordered to be paid; but now, by the 41st section of 15 & 16 Vict. c. 87 (the Sutors in Chancery Relief Act), "The deposit now payable on setting down appeals and exceptions for hearing shall continue to be payable, and such deposits shall be paid to and received by the senior Registrar of the Court of Chancery for the time being, who shall, once in every three months, pay all sums so received by him into the Bank of England, to the credit of the Accountant-General of the said Court, and the several sums, when so paid in, shall be from time to time placed to an account to be intituled 'The Appeal Deposit Account;' and the moneys, which shall from time to time be standing to such account, shall be paid and applied as the Court of Chancery shall from time to time in that behalf order or direct."

To carry out this enactment, a General Order was issued on the 10th day of December, 1852, directing, first, that the balance of

ews, 1 Rand. 462; *Syme v. Johnson*, 3 Call, 523; *Van Wezel v. Van Wezel*, 3 Paige, 38; *Gregory v. Dodge*, ib. 90; *Studwell v. Palmer*, 5 Paige, 57. Where there are two distinct orders in the same cause, they may be both included in one notice of appeal and in the same bond; provided the penalty is sufficiently large, and the condition broad enough to secure the payment of the whole amount required to be secured on both appeals. *Tyler v. Simmons*, 6 Paige, 127. See *Gregory v. Dodge*, 3 Paige, 90.

¹ *Price v. Dewhurst*, 4 M. & C. 282. See *Terry v. Stukeley*, 3 Yerger, 506. In *Andrews v. Scotton*, 2 Bland, 629, it was held, that an appeal bond, on the decree being affirmed, becomes thereby an additional security for the debt.

² See *Consequa v. Fanning*, 3 John. Ch. 365.

cash in the hands of the Registrars, arising from deposits on appeals, rehearings and exceptions, should be paid into the Bank to the account mentioned in the Act. The Order further directs, that in any case when the said Court has heretofore by any order directed, or shall hereafter direct, any such deposit or portion of deposit to be paid, the same shall be paid by the Accountant-General of the said Court, out of any sum of cash which, at the time of payment, may be in the Bank to his credit, in the account intitled "The Appeal Deposit Account," to the party or parties to whom such deposit or portion of deposit is ordered to be paid, or to his or their solicitor, to be named in such Order, whose receipt in such later case shall be a sufficient discharge for the same.

By the form of this Order the solicitor will be able to receive the money without a power of attorney from his client.

Where there is an original and supplemental cause, or two supplemental causes, they are considered as one, and the payment of one deposit only is necessary.¹

The order for setting down the cause for rehearing having been passed and entered, must be served upon all the solicitors of the other parties to the suit, at least all those whose interest is affected by the appeal, in the usual way.²

It appears that the order for setting down the appeal must be actually served, to prevent the enrolment of the decree.³

After a petition for a rehearing or of appeal has been presented, it may be withdrawn on application by motion, provided it is consented to by the respondent. If not consented to it cannot be withdrawn, but must come on in its course.⁴

If, when the rehearing is called on, the appellant does not appear, his petition will, upon reading an affidavit of service of the order for setting it down, be dismissed with costs; and so, if the respondent does not appear, the Court will, upon reading a similar affidavit, proceed to hear the appeal *ex parte*. In the case of an appeal motion this affidavit is not now required, but the motion is treated as abandoned.⁵

Where the appeal is against the whole decree, the cause is, in ordinary cases, actually reheard, that is, the pleadings are opened,

¹ Cowper v. Scott, 1 Eden, 17; cited 1 Bro. C. C. 141, ed. Belt.

² Ante, pp. 428, 432.

³ Groom v. Stinton, 2 Phil. 384.

⁴ Thomson v. Thomson, 10 Ves. 30.

⁵ Turner v. Turner, 2 De G., Mac. & Gor. 28, 31.

and the cause proceeded with exactly as if it were an original hearing.¹ The general rule is, that the appellant is entitled to begin, the only exception to which is where a defendant appeals from a whole decree, if it be an original decree.² The reason for this exception is, that in such a case the plaintiff may adduce new evidence and shape his case differently.³ It is, however, in the discretion of the Court to vary these rules.⁴

In an appeal against a judgment allowing a demurrer to the whole bill the plaintiff is entitled to begin.⁵

It is to be observed, that, in the case of a rehearing or appeal, all parties interested in supporting the decree or order appealed from are entitled to be heard, but that no party, except the appellant, can be heard in support of the appeal. If, therefore, any party, who is not included as a co-petitioner in a petition of rehearing, is desirous of appealing, he must present a separate petition;⁶ otherwise he will be precluded from all benefit of the appeal, even though the result of it should be to show that the decree was completely wrong, as well against him as against the appellant. Thus, where one of several defendants appealed, and an order was made dismissing the bill, upon grounds which were equally applicable to other defendants, who did not join in the appeal, it was held, that

¹ *Terhune v. Colton*, 1 Beasley (N. J.) 312; *Pierce v. Wilson*, 2 Clarke (Iowa) 20; *Durkee v. Stringham*, 8 Wis. 1. And in Massachusetts, all interlocutory decrees not appealed from "shall be open to revision on appeals from final decrees, so far only as it appears to the full Court that such final decrees are erroneously affected thereby." Genl. Sts. c. 113, s. 11.

Where there is an interlocutory judgment, by default, against one of several defendants in Chancery, it must abide the result of the final decree; and if another defendant succeed, on an answer going to the entire equity of the bill, the bill should be dismissed with costs, as to all the parties. *Aikin v. Harrington*, 7 Eng. 391. In case an interlocutory decree by a subordinate Court is within the scope of its power, the Supreme Court will not interfere, until the whole case upon a final decree shall be presented. *Warner v. Burton*, 7 Eng. 144.

² If a rehearing is ordered in New Jersey, the party who complains of the decree or order, and applies to have it corrected, is entitled to open and close the argument. Chancery Rule xix. § 1. The granting of a rehearing does not stay proceedings on any interlocutory decree or order, unless a special order be obtained for that purpose. Rule xix. § 4.

³ *Freer v. Hesse*, 4 De G., Mac. & Gor. 495; *Roberts v. Marchant*, 1 Ph. 370; *Lees v. Nuttall*, 2 M. & K. 819.

⁴ *Alexander v. The Duke of Wellington*, 2 R. & M. 35.

⁵ *Attorney-General v. Aspinall*, 2 M. & C. 613.

⁶ *In re Stephen*, 2 Phil. 563; *Foster v. Tyler*, 7 Paige, 48.

such other defendants could have no benefit of the order, although it rendered the decree useless.¹ It seems, however, that if the result of the appeal had been otherwise, and the appeal had been dismissed or the decree only slightly varied, the defendants who did not appeal would, if they had been heard in support of the decree, have been entitled to their costs, either to have been paid directly by the defendant who appealed, or by the plaintiff; such costs to be added to the plaintiff's own costs, and reimbursed to him by the appellant.²

Where there is an appeal against a part of a decree, the whole case is open to the respondent without presenting a cross appeal.³

On a rehearing, all depositions taken before the original hearing, though not then made use of, may be read,⁴ and the plaintiff

¹ *Tasker v. Small*, 1 C. P. Cooper's Reports, 255.

² See *Stocken v. Stocken and Stubbs v. Sargon*, cited *ibid.* 257.

³ *Watts v. Symes*, 1 De G., Mac. & Gor. 240; *Sherwin v. Shakespeare*, 5 De G., Mac. & Gor. 523. See *Hawley v. James*, 16 Wendell, 61, 85; *Mapes v. Coffin*, 5 Paige, 296; *Clowes v. Dickenson*, 8 Cowen, 338. A party can appeal only from such parts of a decree as affect himself. *Idley v. Bowen*, 11 Wendell, 227. And if he is aggrieved by part of a decree only, he cannot call in question other parts of the decree in which he has no interest. *Hone v. Van Shaick*, 7 Paige, 222.

⁴ *Cunyngham v. Cunyngham*, Amb. 90; *Needham v. Smith*, 2 Vern. 463; *Dashwood v. Lord Bulkeley*, 10 Ves. 237; *Buckmaster v. Harrop*, 13 Ves. 458; *Huddleston v. Briscoe*, 11 Ves. 587; *White v. Fussell*, 1 V. & B. 153; *Goodyer v. Lake*, cited 1 Blunt's Ambler, 90, n. 4. See *Studwell v. Palmer*, 5 Paige, 166; *Bloodgood v. Clark*, 4 Paige, 574. No paper not before the Court below, or offered and rejected, can be used on the hearing of an appeal from its decision. *Studwell v. Palmer*, 5 Paige, 166. Depositions read on the trial in the Court below without objection cannot be rejected in the appellate Court. *Johnson v. Rankin*, 3 Bibb. 87; *Pillow v. Shannon*, 3 Yerger, 508; *Helm v. Hardin*, 2 B. Monroe, 231, 233; *Birdsong v. Birdsong*, 2 Head (Tenn.) 289. And a general exception to the competency or admissibility of evidence will not avail on appeal. *Bennett v. Oliver*, 7 Gill & John. 191, 192. If an objection to the interest of a witness be not made at the hearing in the Court below, it cannot be made in the appellate Court. *Respass v. Morton*, Hard. 226. In appeals to the Supreme Court of the United States from the Circuit Courts, in Chancery cases, the parol testimony, which is heard at the trial in the Court below, ought to appear in the record. *Conn v. Penn*, 5 Wheaton, 424.

In Massachusetts, the testimony of witnesses examined orally before a single justice upon any matter pending before him in Equity, in which an appeal is taken, shall be reported to the full Court. And the Court is required to provide by general rules for some convenient and effectual means of having the same reported by the Justice before whom the hearing is had, or by some person designated by him

may withdraw from the evidence any portion of the answer which may have been read in the Court below.¹

It seems, however, that if, after the hearing, a witness has been convicted of perjury, the circumstance may be brought before the Court upon a rehearing. So also, where a witness, in an answer to a bill exhibited against him since the original hearing, had confessed, that, on the day he was examined, he took a bond from the plaintiff, whereby the plaintiff bound himself, that, if he recovered the estate in question, he would convey part of it to the witness, the answer was allowed to be read at the rehearing to take off the effect of the witness's evidence;² but it has not been permitted to either party to enter into any evidence requiring new depositions.³ This rule has not prevented the production at a

for that purpose. No oral evidence shall be exhibited to the full Court, but the cause be heard, on appeal, upon the same evidence as on the original hearing; but the full Court may grant leave to parties, in special cases of accident or mistake, to exhibit further evidence, and may provide by general rules, or by special order, for the conditions under, and modes by which such evidence shall be taken. Genl. Sts. c. 113, s. 21. And by Rule of the Court, it is provided that when a case is heard before a single Justice upon any interlocutory question, or upon a hearing for a final decree, the evidence shall not be reported for a hearing upon an appeal to the full Court, unless one of the parties, before any evidence is offered, shall request that the same be so reported; in which case, the Justice hearing the cause shall appoint some suitable disinterested person to take the evidence. The expense of taking the evidence shall be paid by the party requesting the taking the same, to be allowed in the taxation of costs, if costs are decreed to him. Rule 34, in Equity.

¹ *Allfrey v. Allfrey*, 1 M. & G. 87; *Oyle v. Morgan*, 1 De G., Mac. & Gor. 359.

² *Needham v. Smith*, 2 Vern. 468.

³ If new evidence is discovered after the original hearing, the proper course is to obtain leave to file a supplemental bill in the nature of a bill of review, to come on for hearing at the same time with the rehearing of the original decree.

As a general rule, when a rehearing is granted in Equity, the Court will not permit an examination at large; no proof will be admitted but what was heard, or ought to have been heard, upon the original hearing. *Scales v. Nichols*, 2 Yerger, 140; *Dale v. Roosevelt*, 6 John. Ch. 255; *Scribner v. Williams*, 1 Paige, 550; *Mitchell v. Lenox*, 14 Wendell, 662; *Wendell v. Lewis*, 6 Paige, 233; *Lovell v. Hicks*, 1 Irish Eq. 472; *Case v. Towle*, 8 Paige, 479; *Jenkins v. Eldredge*, 3 Story C. C. 299. If the appellant wishes to offer new evidence, he should, in his petition of appeal, ask leave to produce further proofs, and state his excuse for not producing such evidence in the Court below. *Scribner v. Williams*, 1 Paige, 550. Where there is newly-discovered testimony, such as would authorize a bill of review, or where there has been surprise, by the Court unexpectedly relying on evidence at the hearing, which could be satisfactorily explained by other

rehearing of exhibits which were not in evidence at the original hearing,¹ and an order to prove *vivâ voce* such exhibits at the hearing of the appeal always might have been obtained without notice.²

From these rules it would appear that no new witness could now be examined before the Examiner upon a rehearing, but the Court of Appeal may, if it think fit, exercise the power conferred upon the Court, by the 39th section of 15 & 16 Vict. c. 86, of examining a witness or party orally at the hearing.³

It is also to be observed, that, in no case, has the Court permitted new evidence to be given, at a rehearing, as to any matter which was not in issue upon the original hearing.⁴

It may be noticed in this place, that, in case of a rehearing or appeal, the whole case is open to the respondent ;⁵ thus, if the appeal is against the whole decree, it is competent to the Court to modify the decree, by making it more favorable to the respondent ;⁶ therefore, where a plaintiff who had succeeded in obtaining a decision against the defendant, with costs, had the cause reheard, in order to obtain an alteration in the decree more favorable to himself ; whereupon Lord Cottenham, upon the rehearing, being

testimony ; in these cases, and perhaps others of a like nature, the Court will permit the testimony to be taken, if it is satisfied by affidavit of its materiality. *Scales v. Nichols*, 2 Yerger, 140. So it appears a party may be let in to read fresh evidence, not read at the former hearing, where it has been duly taken in chief, and *omitted* by negligence or other cause to be read, or if the evidence be new matter not before ready, or relates only to papers since found, and which may be proved *vivâ voce*, at the hearing, or to testimony going to show the incompetency of a witness in a former deposition. *Dale v. Roosevelt*, 6 John. Ch. 255. See *Story v. Johnson*, 1 Irish Eq. 586 ; *Wendell v. Lewis*, 6 Paige, 233 ; *Hill v. Chapman*, 1 Sumner's Vesey, 405, note (a), and cases cited.

¹ For. Rom. 183 ; *Walker v. Symonds*, 4th August, 1810, cited 1 Mer. 37, n. (a). See *Studwell v. Palmer*, 5 Paige, 166 ; *Lovell v. Hicks*, 1 Irish Eq. 480 ; *Jenkins v. Eldredge*, 3 Story C. C. 299. Exhibits read in evidence in the Court below, without objection, will in the appellate Court be considered as part of the record. *Helm v. Hardin*, 2 B. Monroe, 231, 233.

² *Herring v. Clobery*, Cr. & Ch. 251 ; and see *Hood v. Pimm*, 4 Sim. 101 ; *Williamson v. Hutton*, 9 Price, 187 ; *Williams v. Goodchild*, 2 Russ. 92 ; *Wyld v. Ward*, 2 Y. & J. 381 ; *Higgins*, 5 Russ. 287.

³ *Martin v. Pyerofst*, 2 De G., Mac. & Gor. 785.

⁴ *Holt v. Burleigh*, Prec. in Ch. 293.

⁵ See *Terhune v. Colton*, 1 Beasley (N. J.) 312, 318 ; *Consequa v. Fanning*, 3 John. Ch. 587.

⁶ *Sullivan v. Jacob*, 1 Moll. 472 ; and see p. 1564, note 3.

of opinion that the plaintiff was not entitled to any relief at all, dismissed the bill with costs, saying, "The plaintiff having thought fit to present a petition of rehearing against the whole decree, the defendants are entitled to raise any question (and amongst others the question of costs), and I am bound to deal with the cause as if it now came on before me upon the original hearing.¹ The result is, the defendants must have their costs of the suit up to and inclusive of the hearing, but I cannot give them their costs of setting the decree right."

So where the appeal is against part of the decree only, the respondent may, if he considers it necessary, go into the whole case and every part of it, whilst, in relation to the appellant, it is only as to the parts complained of in the petition.²

The reader is to be reminded here, that, at the hearing of an appeal, or rehearing, the Court will give the plaintiff leave to amend, by adding parties in the same manner as upon an original hearing, and will order the rehearing to stand over for the purpose; and that it has gone to the extent of allowing the plaintiff to add the Attorney-General as a party, either by converting the bill into an information and bill, or into an information only.³

The costs of a rehearing, as well as of an original hearing, are in the discretion of the Court; but, generally, if an appeal is dismissed, it will be with costs.

From a certificate furnished to Lord Langdale, M. R., in the case of *Agabez v. Hartwell*,⁴ it appears, that "It is a general rule, that costs of appeals, rehearings, and exceptions, are not carried by the words 'costs of suit as between solicitor and client,' but require to be specially mentioned in the order for taxation."

¹ *Oldham v. Stonehouse*, 3 M. & C. 317.

² *Rawlins v. Powell*, 1 P. Wms. 299. On a rehearing, the cause is open to the party who petitions for it, only as to those parts of the decree complained of in the petition; but to the other party, it is open as to the whole matter. Consequa *v. Fanning*, 3 John. Ch. 394; *Dale v. Roosevelt*, 6 John. Ch. 255; *Ferguson v. Kimball*, 3 Barb. Ch. 616. See *Glover v. Hodges*, 1 Saxton (N. J.) 113, where it was held in New Jersey, that on a petition and order for a rehearing generally, the whole case is open, and the party supposing himself aggrieved has a right to insist upon a reconsideration of any part of it. See also to the same effect, *Sparhawk v. Buel*, 9 Vermont, 41. See *Hill v. Chapman*, 1 Sumner's Vesey, 405, note (a).

³ *President of St. Mary Magdalen v. Sibthorp*, 1 Russ. 154. See 2 Hoff. Ch. Pr. 38.

⁴ 5 Beav. 172.

If the decree or order be varied, the subsequent proceedings go on in the Court below, as if the order made in the Court of Appeal had been made in the Court below.¹

SECTION III.

Of Appeals to the House of Lords.

ANY person who feels himself aggrieved by a decree or order of the Court of Chancery is entitled, as a matter of right, to appeal to the House of Lords.²

The mode of obtaining the interposition of this tribunal, in the case of an appeal from this Court, is by petition of appeal, which may be preferred from an interlocutory as well as from a final order ;³ in which respect appeals from Courts of Equity, by peti-

¹ *Sowden v. Marriott*, 2 Phil. 623 ; *Salkeld v. Johnston*, 1 Mac. & Gor. 256 ; *Malcolm v. Scott*, 3 Mac. & Gor. 52. In Massachusetts, on the reversal of any final decree, the Court may remand the cause, with such directions as are necessary and proper, to a single Justice, further to proceed therein, or may refer it to a Master, or take such other order respecting future proceedings therein as Equity requires, and as shall be most conducive to the just and speedy determination of the cause. Genl. Sts. c. 113, s. 8.

² In Massachusetts, any party aggrieved by a final decree, made by a single Justice, may, within thirty days after the entry thereof, claim an appeal, to be entered upon the Clerk's docket ; and so, from all interlocutory decrees made by a single Justice, any party aggrieved may appeal, in like manner to the full Court. Genl. Sts. c. 113, ss. 8, 10. And a party, having, by accident or mistake, omitted to claim an appeal from any final decree, within the time allowed for that purpose, may, at any time within one year after the entry of the decree, from which he desires to appeal, apply to the full Court, by petition for leave to appeal ; which may be granted upon such terms as appear to the Court just and equitable. Genl. Sts. c. 113, s. 13. It is further provided, that the Justice, by whom a case is heard for a final decree, may reserve and report the evidence and all questions of law therein, for the consideration of the full Court ; and thereupon like proceedings shall be had as on appeals from final decrees. Genl. Sts. c. 113, s. 15.

³ See *Townsend v. Smith*, 1 Beasley (N. J.) 353. The practice is otherwise in the Courts of the United States, where the right to appeal is by law limited to final decrees. In this respect the practice of the United States Chancery Courts differs from the English practice. Per Taney C. J. in *Forgay v. Conrad*, 6 Howard (U. S.) 205. In the Chancery Courts of the United States an appeal will not lie from an interlocutory order, *ib.* ; *Perkins v. Fourniquet*, 6 Howard

tion, differ from appeals, by writ of error, from the judgments of the Courts of Law, which will only lie where the judgment is final. The reason for this distinction is stated to be, that Courts of Equity often decide the merits of a case in intermediate orders, and the permitting of an appeal, in the early stage of the proceedings, frequently saves the expense of further prosecuting the suit; but in actions at Law, no such orders intervene, consequently a writ of error cannot be brought before final judgment.¹

It is, however, to be observed, that although appeals will lie to the House of Lords, it is only in cases where such orders have been pronounced by the Court of Appeal, or have been enrolled.

It may be laid down also, as a general rule, that an appeal to the House of Lords will only lie from a decree or order made in a cause or suit irregularly instituted; and that an appeal will not lie from an order of the Lord Chancellor, or Lords Justices, in matters of idiocy or lunacy, there being a distinction between the jurisdiction of the Court of Chancery and the power of the Lord Chancellor; in those cases, an appeal lies to the Privy Council.²

By the 10th section of the Act, making the Lords Justices,³ "All decisions, decrees or orders of the Court of Appeal, including (U. S.) 206; S. C. 16 Howard (U. S.) 85; Pulliam v. Christian, 6 Howard (U. S.) 209. See Rodman v. Forline, 2 Met. (Ken.) 325; Hall v. Lamb, 28 Vermont, 85; Heath v. Vrelan, 11 Maryland, 388. "In limiting the right of appeal to final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it, decided in a single appeal." Per Taney C. J. in Forgay v. Conrad, 6 Howard (U. S.) 205.

A decree that a community of gains existed between husband and wife, and ordering an account to be taken, is not final, and an appeal does not lie. Perkins v. Fourniquet, 6 Howard (U. S.) 206. A decree rendered on the trial of a feigned issue, directed out of Chancery, is an interlocutory judgment, from which no appeal can be prosecuted. Woodside v. Woodside, 21 Ill. 207. But where the decree decides the right to property, and directs it to be delivered up or sold, or a sum of money to be paid, and the plaintiff is entitled to have such decree carried into immediate execution, this is a final decree from which an appeal lies. Forgay v. Conrad, 6 Howard (U. S.) 201. This does not, however, extend to mere transfers of the possession, for the purpose of securing property in litigation, such as payments into Court, appointments of receivers, and the like. 1b. See ante, "General Nature of Decrees."

¹ Palmer's Prac. of the House of Lords, 1.

² 3 P. Wms. 108; Rochfort v. Earl of Ely, 1 Bro. P. C. 450.

³ 14 & 15 Vict. c. 83.

ing decisions in matters of bankruptcy, shall be subject to appeal to the House of Lords in the cases and under the conditions in and under which the like decisions, decrees or orders of the Lord Chancellor would have been subject to such appeal if this Act had not been passed, but the appeal to the House of Lords in matters of bankruptcy shall be only on matters of Law or Equity, or on the rejection or admission of evidence, and on a special case to be approved and certified by one of the Judges of the Court of Appeal hereby constituted, whose determination on the settlement of such case shall be final and conclusive.”

By a Standing Order of March 24, 1725,¹ no petition of appeal can be received *after five years* from the signing and enrolling or extracting of such decree or sentence, and the end of fourteen days after the first day of the session or meeting of Parliament next ensuing the said five years, unless the person, entitled to such appeal, *be within the age of one-and-twenty years, or covert, non compos mentis, imprisoned or out of Great Britain or Ireland*; in which case such person shall be at liberty to bring his appeal within five years next after such disability shall cease, and fourteen days after the first day of the session next ensuing the said five years, but not afterwards. This Order was amended in 1829, by substituting *two years* for *five*, within which the party must bring his appeal, and by ordering that in no case shall any person be allowed a longer time *on account of mere absence* to lodge an appeal, than *five years* from the date of the last decree appealed against.² It has, however, been held, that an appeal brought from a decree more than *five years* after its enrolment was saved by being extended to subsequent orders, the appeal from which was brought within two years from enrolling them.³ In *Hicks v. Cook*,⁴ however, the Lords affirmed the decree, wholly because of the acquiescence.⁵

¹ Lords' Journ. 1725.

² See 4 Cl. & Fin. 562.

³ *De Burgh v. Clarke*, 4 Cl. & Fin. 562.

⁴ 4 Dow. 29.

⁵ Where the time for appealing has been fixed by statute, the Court has no power to extend it, not even on the ground of the mistake of the party; and the lapse of time is an absolute bar to the appeal. *Townsend v. Townsend*, 2 Paige, 413; *Barclay v. Brown*, 7 ib. 245; *Caldwell v. Mayor, &c. of Albany*, 9 ib. 572. Nor can the Court vacate the order, and cause it to be entered as of a more recent date, to enable the party to appeal therefrom, ib.; *Caldwell v. Mayor, &c.*

By another Standing Order of the 13th July, 1678,¹ "Petitions of appeal from a Court of Equity must be presented within fourteen days from the first day of every session or meeting of Parliament after a recess, unless upon a decree made whilst the Parliament is actually sitting; in which case the party may bring his petition of appeal, provided he presents it within fourteen days after such decree is made and entered in any Court of Equity in England or Wales, twenty days in any of the Courts in Scotland, and forty days in any of the Courts of Equity in Ireland."²

The next requisite to be observed, before presenting an appeal, is that of giving notice, or, as it is termed in Scotland, *intimation*, to the other side, of the intention to present it, which is regulated by a Standing Order of the 9th of April, 1812,³ whereby, "To prevent delay on the part of respondents to appeals, in delivering their printed cases, it is ordered, that, previous to any petition of appeal being presented to the House, a notice shall be given to the agents of the parties respondents, of the time when such petition is intended to be presented; and the day of giving such notice shall be endorsed, by the petitioner's agent, on the back of the appeal."

A petition of appeal to the House of Lords is nearly the same in form, *mutatis mutandis*, as a petition for rehearing in the Court of Chancery.⁴

By an Order of the 3d of March, 1697,⁵ "All appeals are to be signed by two counsel, but no person may presume, as counsel, to sign any appeal, unless he has been of counsel in the cause below, or shall attend as counsel at the bar of the House when the appeal is to be heard; *and unless he shall certify that, in his judgment, there is reasonable cause of appeal.*"⁶

of Albany, 9 Paige, 572. But where the time for appealing depends on a rule of the appellate Court, such Court, upon sufficient cause shown, may suspend its rule and allow an appeal, although such appeal was not brought within the time prescribed by the rule for appealing. *Caldwell v. Mayor, &c. of Albany*, 9 Paige, 572; *Smith v. Smith*, 1 Paige, 391. If the appeal is not taken within the proper time, the objection should be taken by motion. It is too late to do so at the hearing. Per Sutherland J. in *Disbrow v. Henshaw*, 8 Cowen, 353.

¹ Lords' Journ. 1678.

² Palmer's Prac. H. L. 13.

³ Lords' Journ. 1812.

⁴ Ante, p. 1555, *et seq.*

⁵ Lords' Journ. 1697.

⁶ Palmer's Prac. H. L. 16. See *Fulton Bank v. Beach*, 2 Paige, 188.

But, notwithstanding the latter words in the above Order, it appears not to have been the practice, a short time ago, for counsel signing appeals formally to certify that there is reasonable cause of appeal, though the signature of counsel was always understood to import it;¹ probably, the omission of this certificate arose from the Order of the House of Lords, which will be noticed presently, requiring the parties to appeals to print their cases forthwith; the object of which appears to have been the same as that requiring the certificate of counsel, viz., to prevent appeals merely for delay and vexation.² It appears, however, to be now the practice for counsel to certify that there is reasonable cause for appeal.³

When the petition of appeal has been settled and signed by counsel, with a certificate of reasonable cause, it must be fairly engrossed, that is, transcribed in a strong round hand on parchment, (the words to be written at length,) with the names of the counsel, as well to the appeal as to the certificate, copied to it, and the certificate of notice is to be endorsed.⁴

A petition of appeal, like all other petitions to the Lords, is presented by a peer, who mentions it to the House in the words of the title, and moves that the petition may be read; the clerk thereupon reads the prayer, and the proper order is made as a matter of course.⁵

Upon English appeals the time limited for answering is a fortnight, in Scotch appeals four weeks, and in Irish appeals five weeks, from the date of the order.

The order in an English cause may be served on the respondent, if in London, or his solicitor. If the appeal be from Ireland, the order should be sent off without delay, to be served there; but care must be taken, by the appellant's solicitor, to enter into a recognizance as after mentioned, otherwise the appeal will fall to the ground.

¹ Per Lord Eldon, *Way v. Foy*, 18 Ves. 452.

² *Ibid.*

³ See Palmer's *Prac. H. L.* 23.

⁴ *Ibid.*

⁵ *Ibid.* 24. The usual mode is for the agent to put the appeal into the hands of the Clerk Assistant at the House, or to leave it with the Clerk of the Journals at the Parliament Office, either of whom gets a noble Lord to move it; but should it happen that those gentlemen are too much engaged, the agent must apply to some Lord to move the appeal, in which there will be no difficulty. *Ibid.*

The mode of serving the order is by delivering a true copy of it, and at the same time showing the original order.

When the order is served, there should be an affidavit of the service endorsed on it, in the usual form.

After an appeal has been lodged, the appellant is, within eight days, to enter into recognizance to answer costs, pursuant to the following Standing Order:—

January 26th, 1710: “It is this day ordered, that in all cases of appeals to be brought into this House, from any Court in Westminster Hall, from any Court of Equity in England or Wales, from any Court in Scotland, or from any Court of Equity in Ireland, the parties appellant shall, within eight days after such appeal received, give security to the Clerk of the Parliaments, by recognizance, to be entered in to his Majesty in the penalty of 400*l.*, conditioned to pay such costs to the defendant as this Court shall appoint, in case the decree appealed from shall be affirmed; and if the appellant or appellants shall neglect to give such security within the time aforesaid, the Clerk of the Parliaments shall inform the House thereof, and the appeal from thenceforth to be dismissed.”¹

If the appellant should not be in London to enter into the recognizance, his solicitor, or some other person for him, may enter into it, for which the leave of the House must be obtained; this is done upon a motion, to be made by a Lord.

Although the words of the order for entering into recognizances are general, yet, in practice, there is an exception, viz.:—

In appeals brought by the Attorney-General on behalf of the Crown, no recognizance for costs is entered into, because costs are never awarded against the king.²

If an answer be not put in within the time limited for that purpose, the appellant’s agent should obtain a peremptory order upon the respondent to answer.³

To obtain such peremptory order, the appellant’s agent leaves at the Parliament Office the first order with the affidavit of service, and, upon the clerk’s reading the affidavit in the House, the peremptory order is made as a matter of course; but, in point

¹ Lords’ Journ. 1710.

² Palmer’s Prac. H. L. 28.

³ Lords’ Journ. January 19th, 1719. See *Irving v. Dunscomb*, 2 Wendell, 205; *Waters v. Travis*, 8 John. 566.

of regularity, this order ought to proceed upon the motion of a peer.¹

A week is always the time limited by a peremptory order, and, upon the expiration of the week, if no answer has been put in, the appellant's agent may apply to the House by motion, to be made by a peer, to have the cause appointed for hearing *ex parte*.

Although the Lords expect that parties should conform to their Standing Orders, yet, when circumstances manifestly require it, they will dispense with them; as, where by reason of sickness or other inevitable accident, the agent has been prevented from presenting an appeal, or the respondent from filing his answer, within the limited period; and so, in all cases, where there has been no wilful neglect, provided it can be made appear that no inconvenience is likely to accrue from refusing the indulgence; but in these cases an order must be obtained to dispense with the Standing Order, upon a petition for that purpose.

This petition is to be moved by a peer, upon which occasion the agent must attend the House; for, in these cases, he is called to the bar and examined by the House as to the allegations of the petition, and, sometimes, he is sworn to the truth of them.

Petitions of this description, however, are now generally referred to the Lords' Committees of Appeals.²

On being served with the order to answer, the respondent should instruct an agent to apply at the Parliament Office and bespeak an office copy of the appeal; and, if the respondent wishes to expedite the hearing, he may, on having notice that an appeal is intended, and without waiting till the order of summons is served, or the time for answering expired, put in his answer.

Answers are of two kinds, one general, the other special.

A general answer is in the following form:—

“ The answer of C. D., respondent, to the petition and appeal of A. B., appellant.

“ The respondent, not confessing or acknowledging all or any of the matters and things in the said petition and appeal mentioned to be true as the same are therein set forth, and reserving to himself all benefit and advantage of exception to the errors, defects and imperfections in the said appeal contained, for answer thereunto saith, he admits that the Court of Chancery (or the Court of Chan-

¹ Palmer's Prac. H. L. 28.

² Ibid 31.

cery in Ireland) did make such decree or order, as in the said petition and appeal is [or are] mentioned and complained of, but as to the date and contents of such decree [or order] the respondent, for greater certainty, refers to the said decree [or order] when the same shall be produced; but the respondent is advised, and humbly apprehends, that the decree [or order] complained of is agreeable to equity and justice, and, therefore, humbly hopes the same will be affirmed and the appeal dismissed with costs.

*“E. F., agent for the respondent.”*¹

It sometimes happens that the respondent determines to bring a cross appeal, in which case the answer should be qualified thus, “That the said decree, so far as the same is complained of by the said petition and appeal, is agreeable to equity,” &c.

An answer is *special*, when particular facts are stated, or some specific matter is alleged, either upon the merits of the cause, or upon any defect in form in the appeal; such as that there are not proper parties; or that the decree or order appealed from did not become final, but remains under review or rehearing; or that the date or purport of the decree or order is erroneously stated in the appeal. But special answers have not for a long time been deemed necessary, nor used in practice, and, in fact, the matters here noticed are more properly grounds for an application to the House to dismiss the appeal for irregularity, of which we shall speak hereafter. It is, therefore, of little use to the respondent to point objections by his answer; and the more general the answer is the better, especially as any errors or defects pointed out by a special answer can be amended by application to the House; so that, in truth, they would only be productive of expense and delay.

Answers are engrossed on parchment, and then lodged in the Parliament Office, when the clerk marks on it the day it is brought in, according to a Standing Order of the 5th of April, 1720,² by which it is “Ordered, that when any answer to an appeal shall be put in for the future, the clerk, to whom it shall be delivered, do immediately endorse thereon the day on which such answer is brought in, and that the names of the parties answering, and to whose appeals such answers are put in, be the same day entered in the Journals of the House.”³

¹ See *Fulton Bank v. Beach*, 2 Paige, 188.

² Lords' Journ. 1720.

³ Palmer's Prac. H. L. 33.

In some cases both parties are dissatisfied with the determination of the Court below, and the respondent as well as the appellant is advised to prefer a cross appeal; the time allowed for bringing in which is limited by the Standing Order of the 8th March, 1763,¹ to one week after answer put in to the original appeal, after which the same will not be received. If the time limited by the last recited order for presenting a cross appeal be elapsed, the House, on petition, will grant leave to present it *nunc pro tunc*, if good cause can be shown for the omission.²

A cross petition of appeal is, in form, the same as an original appeal, except that it must be entitled "The petition and cross appeal," &c., and should specify the particular part of the decree or order of which the petitioner complains. It is presented and moved, and an order made upon it, in the same manner as upon an original appeal.

The Order of the 27th of January, 1719, is silent as to recognizances for costs in cross appeals. It is said that, formerly, they were sometimes entered into, but they are not now required. Cross appeals must, however, be signed by counsel, although that is not expressly directed by the Order of the 3d of March, 1697.³

The order to answer a cross appeal may be served in the same manner as the order in an original appeal; but the respondent in the cross appeal being appellant in the original appeal, *et e contra*, by which both parties are in Court, service of the order upon the agent of the respondent in the cross appeal is sufficient.⁴

The answer to a cross appeal is in the same form with that to an original appeal, except that the title is, "The answer of *A. B.* to the petition and cross appeal of *C. D.*," and that, towards the end, instead of saying "That the decree, &c., is just," &c., it should be "That the decree, *in so far as is complained of by the said C. D.*, is just and agreeable to equity," &c.⁵

In case the session ends before the time limited for answering an appeal expires, this circumstance is provided for by the following Standing Order:—

"28th of March, 1735.—It is ordered, that, when upon an appeal to this House, an order shall be made for the respondent to

¹ Lords' Journ. 1763.

² Palmer's Prac. H. L. 34.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

answer by a time limited, if the session of Parliament wherein such order shall be made, shall determine before the time so limited for answering shall be expired, and no answer shall be put in during the same session, service of such order upon the respondent, five weeks before the first day of the then next session, shall be deemed good service, and the appellant may apply for a peremptory day, in case the respondent shall not put in his answer within three days from the first day of the next session of Parliament.”¹

Formerly some doubts and questions arose as to the effect of prorogations and dissolutions of Parliament, and whether the judicial as well as legislative proceedings of the Lords were not thereby determined; in consequence of which it has been determined, “That in all cases of appeals and writs of error, they continue and are to be proceeded on *in statu quo*, notwithstanding a prorogation or dissolution of Parliament.”²

By a Standing Order of the 5th April, 1720, it is “Ordered, that all such appeals as shall be presented in any session, to which answers shall be put in during the same session, and for hearing whereof no day shall be appointed in such session, if neither the appellant or respondent shall apply to this House within eight days, to be accounted from the first day of the next meeting of Parliament, for a day of hearing, such appeals shall stand dismissed, but without prejudice to the appellants presenting any new appeals thereafter.” It is also “Ordered, that all such appeals as shall be presented in any session to which no answer shall be put in during the same session, if neither the appellant, within eight days from the first day of the next meeting of Parliament, shall apply to this House to appoint a peremptory day to answer, nor the respondent put in an answer within the said eight days, such appeals shall stand dismissed, but without prejudice to the appellant’s presenting any new appeals thereafter.”³

The House of Lords will permit a petition of appeal to be

¹ Palmer’s Prac. H. L. 36; Lords’ Journ. 1735.

² Palmer’s Prac. H. L. 37.

³ Palmer’s Prac. H. L. 38; Lords’ Journ. 1720. Where an appeal has been regularly taken from an interlocutory decree, mere delay in the prosecution of it is not a ground for its dismissal. *Dey v. Walton*, 2 Hill (N. Y.) 403. Nor is it ground for dismissal, that the appellant has omitted to give notice of an order to answer the appeal. *Dey v. Walton*, 2 Hill (N. Y.) 403.

amended after it has been presented ;¹ thus, if any error is discovered in the petition, or if the appellant is advised that some previous orders are so connected with the order appealed from, that it will be impossible to do justice to his case without extending his appeal to these former orders, he should apply for liberty to amend his appeal.²

To obtain leave to amend a petition must be presented, of which two days' notice in writing is to be given to the opposite agent, and it should be accompanied by a copy of the petition.

On the moving of this petition, it will be proper for the agents, on both sides, to attend the House, in order to answer any question which may be asked ; and, lest the adverse agent should not attend, the petitioner's agent should be prepared to prove, at the bar of the House, the service of the notice and petition.

Applications to amend are not confined to the appellant, but may also be made by the respondent, who is interested in seeing that all the proceedings are correct, except that the respondent's petition should pray — " That the appellant may be ordered to amend his appeal in the particulars set forth, and to amend the respondent's copy."

If an appeal be amended after the respondent has put in an answer, and it is considered necessary that a new answer should be put in to the amended appeal, he must obtain an order for leave to withdraw the former answer, and put in a new one, in which case the respondent will be entitled to costs.

An order to this effect may be obtained on petition ; but if the respondent do not voluntarily apply for such an order, and put in his answer, the appellant may proceed against him by a new peremptory order, and may get the cause set down *ex parte*, as already mentioned.³

If the appellant finds it expedient to withdraw his appeal, he must obtain leave of the House to do it by petition ; of which two days' notice must be given to the respondent's agents, as in other cases, and a copy of the petition also served ; but the House will not grant the prayer of it without ordering the appellant to pay

¹ Palmer's Prac. H. L. 38 ; Lords' Journ. 1720.

² Bouchier v. Dillon, 5 Bligh, N. S. 714.

³ Palmer's Prac. H. L. 42. If the appeal is made after the time allowed for appealing, the objection should be taken by motion to dismiss the same ; and it cannot be taken at the hearing. Answering is a waiver of objections of a formal nature. Disbrow v. Henshaw, 8 Cowen, 353 ; Rogers v. Cruger, 3 John. 564.

the respondent his costs, nor in some instances without the consent of the respondent's agent; for there may be cases in which it would be unjust to permit the appellant to withdraw his appeal, and thereby leave him at liberty, at a considerable distance of time afterwards, to bring a new appeal, which he might do notwithstanding the withdrawing of his former appeal.¹

In case an appeal should be presented, which the respondent has reason to think is irregular, a counter petition should be presented praying to have it dismissed,² and the respondent's agent must give two days' notice to the appellant's agent of his intention, and should, at the same time, serve him with a copy of the petition, and both agents should attend on presenting it; on which occasion (unless there shall manifestly appear to be some palpable breach of the standing orders of the House, or of the legislative enactments respecting appeals, in which case the appeal will be dismissed at once), the petition will be referred to the Appeal Committee, before which the agents and counsel, if desired, will be heard;³ in questions of great importance, however, the arguments have been heard at the bar of the House.⁴

It is to be observed here, that if an irregular plea is presented, the counter petition should be presented before the original appeal is answered, for if the respondent treats it as an effective appeal, by answering it before he presents his counter petition, he will not be entitled to costs.⁵ The usual course of the House, upon such a counter petition being presented, is to refer the petitions to the Appeal Committee, but upon questions of importance they will be directed to be argued at the bar by counsel.⁶

After the answer is put in, either the appellant or respondent may apply to the House, by motion, to have the appeal appointed to be heard.

It sometimes happens that there are two appeals which relate to the same subject, or in which the questions in both are similar, and that one of them has been set down, so as to stand several causes before the other; in such a case, the House, upon a petition, will order the second to stand next to the first.⁷

¹ Palmer's Prac. H. L. 43.

² See *Halsey v. Van Amringe*, 4 Paige, 279.

³ Palmer's Prac. H. L. 44.

⁴ *Norbury v. Meade*, 3 Bligh, 274.

⁵ Ibid.

⁶ Ibid.

⁷ Palmer's Prac. H. L. 46.

By an Order of June the 8th, 1749, "It is ordered, that all such appeals as have been presented, for hearing whereof days shall be appointed in any session which shall not be determined in the same session, shall be heard and determined in the beginning of the next session, in the same order as they stand to be heard at the end of this or any future session, without any new application to appoint a day for hearing the same."¹

It frequently happens that the appellant or respondent dies before the hearing of the cause, in which event the appeal must be revived by petition to the House, in the name of the deceased party's heir or personal representative, or both, as the occasion may require, and supplemental cases delivered. This is regulated by the Standing Order of the 20th March, 1823:—"Whereby it is ordered, that where any parties to an appeal shall die, pending the same, subsequently to the printed cases having been delivered, and the appeal shall be revived against the representatives, a supplemental case shall be delivered by the parties so reviving the same, stating the order or orders made by the House in such case.

"And the like rule shall be observed by the appellant and respondent where parties in the Court below have been omitted in the appeal, and shall, by leave of the House, be added as parties to the appeal after the delivery of the printed cases."

For the better information of the Lords as to the matters in controversy, printed statements of the appellant's and respondent's cases are usually delivered to them, which cases, before they are printed, must be signed by counsel.

The cases should contain all the material facts, and should concisely narrate the proceedings, and the substance of the pleadings and evidence or proofs, whether consisting of documents or depositions, and particularly those on behalf of the party whose case it is. By an Order of the 24th day of February, 1813, it is "Ordered, that the printed cases delivered in appeals and writs of error depending in the House, shall contain a copy of so much of the proofs taken in the Courts below as the parties intend to rely on at the hearing, together with reference to the documents where the same may be found."²

But although the preceding Order directs that the parties shall

¹ Palmer's Prac. H. L. 48.

² Lords' Journ. 1813.

print the proofs they mean to rely on, it was said by Lord Eldon, "That the rule was made by the House for the purpose of guarding itself, but that it is competent to the House to hear evidence not printed, if it thinks proper. The parties are to print what they think material: but, in such a case as that, it was too much to suppose that any one could infallibly say what was and what was not material."¹

By the Standing Order of the 19th of April, 1698, for preventing scandalous and frivolous printed cases being delivered to the Lords, it is ordered that no person whatever do presume to deliver any printed cases to any Lord, unless such case shall be signed by one or more of the counsel who attended the hearing in the Court below, or shall be of counsel at the hearing in this House.² But, although the order expresses that the case may be signed by one or more counsel, the usual course is to have it signed by two.³

When the case has been signed by counsel, there are usually about 140 copies printed off.

Formerly, by a Standing Order of the 12th of January, 1724, the appellants and respondents were to deliver to the Clerk of the Parliaments, to be distributed to the Lords, the printed cases, at least four days before the hearing; but this is now regulated by an Order of the 12th of July, 1811:—"Whereby it is ordered, that, when any appeal shall be presented on or after the first day of a session, the appellant and respondent shall, severally, lay the prints of their cases upon the table of the House, or deliver the same to the Clerk of the Parliaments, *within a fortnight after the time appointed for the respondent to put in his answer*: and in default of so doing by the appellant, the said appeal shall stand dismissed, but without prejudice to his presenting a new appeal within the first fourteen days of the next session of Parliament, or within the then remainder of the time limited by the Standing Order, No. 18 (13th July, 1678), for presenting appeals; and, in case of default on the part of the respondent, the appellant shall be at liberty to set down his cause *ex parte*."⁴

If, through any casualty, either of the parties' agents should be prevented from getting his case prepared in time to lay the prints

¹ 4 Dow. 222. See Macqueen on the Practice of the House of Lords, 193.

² Lords' Journ. 1698; Palmer's Prac. H. L. 53.

³ Ibid.

⁴ Lords' Journ. 1724.

on the table, pursuant to the Standing Order, he must present a petition for a further day, setting forth the cause of delay.¹

“In consequence of the great inconvenience arising by petitions for putting off causes, after days having been appointed for hearing thereof, it is ordered, that when any day shall be appointed for hearing any appeal or writ of error, the same shall not be altered but upon petition; and that no such petition shall be received, unless two days’ notice thereof be given to the opposite party; of which notice, oath shall be made at the bar of the House.”²

It was at one time considered absolutely necessary, when a suit abated after the appeal presented, to revive the *cause* in the Court below, before the *appeal* could be revived; but a different opinion, as well as practice, now prevails; and the order of the House gives no directions to revive the cause in the inferior Court. In the case of *Thorpe v. Mattingley*,³ one of several defendants died pending an appeal to the House of Lords, and the House of Lords having admitted his representatives on that petition as parties to the appeal, eventually made an order varying the decree below, and dismissing the bill as against that defendant with costs; whereupon it was held, that the order of the House of Lords might be made an order of the Court below, without first reviving the suit.

When, however, the abatement takes place before the appeal has been presented, it is the better way to revive first, and to make the representatives parties to the appeal.⁴

Upon a petition being presented, the House will make an order to revive the proceedings, and they will then go on as if the original appellant were living.⁵

The supplemental case, which is directed by the Standing Order of the 20th of March, 1823, may be very short; merely stating the title of the appeal, the different facts set forth in the petition, and the order for the revival of the appeal; which case will not require the signatures of counsel, unless it contains arguments or

¹ Lords’ Journ. 1811. See *Way v. Foy*, 18 Ves. 452, where the object of this Order is stated by Lord Eldon.

² Lords’ Journ. 22d Dec. 1703; and see as to postponements of hearings, Palmer’s Prac. H. L. 59.

³ S. C. 1 Ph. 200 and 443.

⁴ Palmer’s Prac. H. L. 59.

⁵ For Forms of Petition, see Macqueen on the Practice of the House of Lords, 252.

observations; if it should, then it must be signed by counsel. It must be printed and endorsed as the original case, and a sufficient number lodged at the Parliament Office.¹

The order, it will be observed, also directs that supplemental cases shall be delivered where parties in the Court below shall have been omitted, and shall, by leave of the House, be added as parties to the appeal after the printed cases have been delivered.²

By the Standing Order of the 2d of March, 1727, only two counsel on each side can *argue*; but in cases of great importance and complication, it is not uncommon to call in a junior or third counsel for consultation and assistance.³

Though by the Standing Order only two counsel on a side are to be heard, which is founded on a supposition that there are but two parties or sets of parties interested, yet where it appears that the respondents have not identical, but separate and perhaps conflicting, interests, the House will allow a third or additional counsel in support of such interests. To obtain leave to do so, it is usual to present a petition for that purpose, stating the peculiar circumstances.⁴

The mode and order of proceeding at the hearing is regulated by the Standing Order of the 2d of March, 1727, above referred to, whereby it is ordered, that, at the hearing of causes, one of the counsel for the appellants shall open the cause; then the evidence on their side shall be read; which done, the other counsel for the appellants may make observations on the evidence; then one of the counsel for the respondents shall be heard, and the evidence on their side be read; after which, the other counsel for the respondents shall be heard, and one counsel only for the appellants to reply.⁵

When the arguments of counsel are finished, they withdraw from the bar, and the House, if then prepared, give their judgment, affirming the decree or order of the Court below, with or without costs; or reversing or varying the same, according to the circumstances of the case. If any Lord conceives that the decree or order is erroneous, he states his reasons, and moves that it be

¹ Palmer's Practice, H. L. 82.

² Ibid.

³ Lords' Journ. 1727; Palmer's Prac. H. L. 14.

⁴ 9th May, 1812, Palmer's Prac. H. L. 14.

⁵ Palmer's Prac. H. L. 68.

reversed or varied ; and should the rest of the House be of that opinion, the motion is put and carried ; but if it be opposed, then a debate ensues, and the question is put to the vote, on which occasion *proxies* are not allowed ; and it being the rule of the House to put the question for *reversing*¹ the decree or order, unless, upon a division, there is a majority for the reversal, it will be affirmed.²

On some occasions the House, instead of affirming or reversing the judgment, gives directions to the Court below to rectify its judgment ; in such cases, the order of the House of Lords must be made a rule or order of the Court of Chancery.³ So also it must be, if the House of Lords reverse the decree of the Court, because it may otherwise be carried into execution. In *Attorney-General v. Scott*,⁴ where a decree of the Court of Chancery was affirmed by consent, an application was made to the Court, to make the judgment an order of the Court of Chancery, but Lord Hardwicke doubted whether such a thing was ever done ; nor indeed can it under any circumstances be necessary, where a decree is simply affirmed, unless the proceedings under it have been suspended, pending the appeal.

An order, to make a judgment of the House of Lords upon an appeal a rule or order of this Court, may be obtained as of course on motion, upon production of the order signed by the Clerk of Parliament.⁵

It is to be observed, that the House of Lords possesses no officer to whom the taxation of costs can be referred ; it is therefore usual to name a specific sum in the judgment, as the amount of costs to which the party to have them is entitled. This sum is usually settled by the agents on both sides ; but if the agents cannot agree on the amount of the costs, as often happens, as there is no officer belonging to the House authorized or competent to tax them, if the sum demanded should appear to their Lordships to be unrea-

¹ By a Standing Order of the 14th of January, 1694, upon giving judgment in cases of appeal or writs of error, the question shall be put for *reversing* and not affirming the judgment of the Court below.

² See *Bridge v. Johnson*, 5 Wendell, 371.

³ *Attorney-General v. Scott*, 1 Ves. 419 ; *Man v. Ricketts*, 3 De G. & Sm. 446.

⁴ *Ubi supra*.

⁵ 2 Harr. Ch. P. 351 ; *Seton on Decrees*, 392 (n.) 2 ; see, also, *Hand's Prac.* 124 ; *Equity Draftsman*, 625.

sonable, they will order the bill to be referred to some agent or solicitor agreed on by both sides.¹

When costs are awarded to the respondents on the affirmance of a decree or order appealed from, the order dismissing the appeal with costs should be served on the appellant personally; and if the recognizance was entered into by any other person, the order also should, in like manner, be served on him, and the costs demanded of each by the person to whom they are ordered to be paid, or some person by him deputed, by power of attorney, to receive them. It will be proper to serve the order also on the agent.

In case of non-payment of the costs, the respondent petitions the House that the party may be compelled to pay to him the sum of £——, ordered to be paid to him as costs. When this petition is presented, the respondent must be prepared to prove at the bar of the House the personal service of the order, and the demand and refusal of the costs. The House may then either order the parties into custody for the contempt,² or direct the recognizance to be estreated into the Exchequer, which latter is the usual mode.³

Before quitting the subject of appeals to the House of Lords, it is right to mention that a material distinction exists between them and rehearings in the Court below, with regard to evidence.

Upon the rehearing of a cause before the Lord Chancellor, by way of appeal, the reading of evidence, not read in the Court below, is, under certain restrictions, permitted. In the House of Lords, however, the principle universally prevails, that no evidence can be received which was not laid before the Court below, nor can any evidence, which was received below, be objected to above, unless the admission of improper evidence be among the points of appeal.⁴

¹ Palmer's Prac. H. L. 74; and see *Man v. Ricketts*, *ubi supra*.

² As was done in the case of Mr. Carey, Lords' Journ. 21st of March, 1717-18, Harg. Pref. 208; but this is hardly ever done now.

³ Palmer's Prac. H. L. 73. It seems that a *fi. fa.* will not be issued; *Man v. Ricketts*, *ubi supra*.

⁴ *Eden v. Earl Bute*, 1 Bro. P. C. ed. Toml. 465; and see *Baesh v. Moore*, 3 Bro. P. C. 546; and *Button v. Price*, Pree, in Ch. 212. In Tennessee, after a decree was pronounced by the Supreme Court, one of the defendants applied for a rehearing, upon the ground that the deposition of an incompetent witness was ad-

It may be mentioned also, that where evidence has been rejected below, which the House thinks ought to have been received, the usual course is to remit the cause to the Court below; it seems, however, that before doing this the House of Lords will look at the rejected evidence in order to see whether, if it were admitted, it would affect the opinion of the House in forming their judgment.¹

CHAPTER XXXII.

OF ABATEMENT, REVIVOR, AND SUPPLEMENT.

SECTION I. — *Abatement.*

IN the preceding chapters, the attention of the reader has been directed to the rules and course of proceedings in a suit originally perfect in its frame, and in which no incidental circumstances have occurred to alter the state of the original parties, or the relation in which they stood to each other at the commencement of the proceedings. It frequently, however, occurs that, as the cause advances, defects in its original constitution are discovered; or, assuming that it was in all respects correctly instituted, the death of parties, or other events happening subsequently to the commencement of the cause, render it impossible that a suitable hearing or decree can take place. To obviate difficulties of this description it was, until the recent changes in the practice of the Court, the rule for the plaintiff to institute subsidiary suits by filing bills of different descriptions, designated by the terms Bills of Revivor, Bills of Supplement, Bills in the nature of Bills of Revivor and other phrases. The comparative simplicity of modern proceedings in Chancery, and more especially the abbreviation of the time usually elapsing between the commencement of a cause and the hearing, have diminished the number of occasions when it is necessary to have resort to proceedings of this description, mitted, and the decree settled the rights of persons not parties to the suit. A rehearing was refused, and the Court held, that there being no exception in the Court below to the reading of the deposition, the evidence was properly heard. *Birdsong v. Birdsong*, 2 Head (Tenn.) 289.

¹ *McCabe v. Hussey*, 5 Bligh, N. S. 715, 729.

with the view of remedying defects in a cause ; and when such occasions do now occur, the means provided by the present practice are much simpler than they were formerly, and many of the distinctions that formerly prevailed have therefore become obsolete.

It will be convenient, first, to consider the case where the suit was originally perfect, but when an event happening subsequently has caused what is technically called an abatement, that is to say, has put the suit into such a condition that no further proceedings can be taken until the defect is remedied ; and in order to make the provisions of the modern Act of Parliament on the subject of abatement intelligible, it will be convenient to state shortly what was the previous practice to which the Act now applies.

Upon the death of a plaintiff or defendant materially interested, the suit, both according to the former and the present practice, abates.¹ So, also, if a transmission of the interest in the suit of a plaintiff or defendant takes place after the commencement of the cause, it is necessary that the person to whom the interest is transmitted should be before the Court, and until he is made a party the suit is not absolutely abated but deemed defective. Under these circumstances, to render the record complete, different courses were, according to the former practice, necessary. In a simple case a bill of revivor was sufficient, and thereupon, in a few days, an order of course to revive the suit was obtained if no objection was taken. Frequently, however, when there was any fact capable of being disputed in Chancery, as the transmission of the interest, a bill of supplement was necessary ; in which case an answer was put in, a decree was made, and all the proceedings of a formal suit were taken.²

With respect to the species of abatement which might be remedied by bill of revivor, it was laid down, that whenever a suit abated by death, and the interest of the person whose death caused the abatement was transmitted to that representative which the

¹ See *Crook v. Turpin*, 10 B. Mon. 243.

² By rule of Chancery in Maine, when material facts have occurred since the bill was filed, which would entitle the plaintiff to other or more extensive relief on the matters contained in the original bill, leave may be given to file a supplemental bill upon a rule being filed, duly verified, stating the facts and notice given ; and proceedings be had thereon, as is provided in case of exceptions to an answer. The subsequent proceedings, so far as applicable, will take place as on other bills. Rule 22. 37 Maine Rep. 590.

Law gives or ascertains, as an heir-at-law, executor or administrator, so that the title could not be disputed, at least in the Court of Chancery, but the person in whom the title vested was alone to be ascertained, the suit might be continued by bill of revivor merely;¹ so also, if a suit abated by the marriage of a female plaintiff, and no act was done to affect the rights of the party but the marriage, no title could be disputed; the person of the husband was the sole fact to be ascertained, and therefore the suit might be continued in this case likewise, by bill of revivor merely.²

If, however, upon the abatement happening, the interest of the party did not vest in any representative which the law gives or ascertains, as in the case of bankruptcy or insolvency, or of a devisee of real estate, the suit could not be continued by bill of revivor, but must, where the abatement was caused by the bankruptcy or insolvency of a defendant, be continued by supplemental bill.³ So, where the suit abated by the bankruptcy or insolvency

¹ *Boynton v. Boynton*, 1 Foster (N. H.) 246; Story Eq. Pl. § 364; *Feemster v. Markham*, 2 J. J. Marsh. 303. Where a bill in Equity to redeem mortgaged premises is abated by the death of the plaintiff, his heirs may renew the suit by a bill of revivor. *Putnam v. Putnam*, 4 Pick. 139. See *Pell v. Elliott*, 1 Hopk. 86; *Thompson v. Hill*, 5 Yerger, 418; *Douglass v. Sherman*, 2 Paige, 358; *Randolph v. Dickenson*, 5 Paige, 517. In a suit for the rescission of a contract for lands, if the plaintiff dies, it should be revived in the name of the heirs, and not of the executors. If the defendant dies, it is error to take a decree against his heirs till they are served with process, or have answered. *Kincart v. Sanders*, 2 A. K. Marsh. 26. See *Hallett v. Hallett*, 2 Paige, 16; *Bradford v. Felder*, 2 M'Cord Ch. 169; *Kellar v. Beclor*, 5 Monroe, 574; *Wilkinson v. Perrin*, 7 Monroe, 217; *Smith v. Manning*, 9 Mass. 422; *Coons v. Nall*, 4 Litt. 264; *Jackson v. Freyer*, 4 Paige, 51. A suit for usury must be revived in the name of the executor or administrator, and not in the name of the heir. *Meek v. Ealy*, 2 J. J. Marsh. 331.

If a suit abates, after a decree affecting both real and personal property, it may be revived either by the heirs or personal representatives. *Owing's Case*, 1 Bland, 409.

² *Douglass v. Sherman*, 2 Paige, 358; *Boynton v. Boynton*, 1 Foster (N. H.) 246. The object of the bill of revivor is, to bring the husband before the Court. 1 Smith Ch. Pr. 516; *Campbell v. Bowne*, 5 Paige, 34; Story Eq. Pl. § 364.

³ See *Johnson v. Fitzhugh*, 3 Barb. Ch. 360. Where a creditor's bill is brought against a debtor, who afterwards obtains a discharge in bankruptcy, the plaintiff, if he wishes to contest the validity of the discharge, should file a supplemental bill, setting out the commencement of the original suit, the subsequent decree in bankruptcy, the discharge, and the facts relied upon to avoid the discharge, and should make the assignee and the bankrupt parties to such bill. *Penniman v. Norton*, 1 Barb. Ch. 246; *Alcott v. Avery*, 1 Barb. Ch. 347. But

of a sole plaintiff, his assignees could not continue the suit by bill of revivor, but must do so by original bill, in the nature of a supplemental bill. So also, in a suit relating to land, where a plaintiff died, having devised the land which was the subject of the litigation, the suit could not be continued on the part of the devisee by a simple bill of revivor.¹

The same rule applied to abatements occasioned by the death of parties defendant as well as of parties plaintiff; therefore, a bill of simple revivor did not lie against the devisee of a defendant, but the suit was continued against him in the same manner that it was continued by the devisee of a plaintiff.

It has been necessary to refer to the nature of the distinctions that existed in the former practice, in order to render the new rules intelligible.

The Act of Parliament² now declares, "that upon any suit in the said Court becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, it shall not be necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive such suit, or the usual or necessary decree or order to carry on the proceedings; but an order to the effect of the usual order to revive or of the usual supplemental decree may be obtained as of course upon an allegation of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability,³ and an order so obtained, when served

if he merely wishes to proceed against the property, he must revive the suit against the assignee alone, stating the discharge as a reason for proceeding no farther against the bankrupt; and if the assignee has sold his interest in the property, that fact should be shown, and the purchaser made a party to the suit, instead of the assignee. *Penniman v. Norton*, 1 Barb. Ch. 246.

¹ *Slack v. Walcott*, 3 Mason, 308; *Douglass v. Sherman*, 2 Paige, 358; *Russell v. Craig*, 3 Bibb, 377.

² 15 & 16 Vict. c. 86, s. 52.

³ In Maine, bills may be revived, in proper cases, by an amendment filed with the clerk on which a subpœna and other process may issue, and be served as in case of an original bill; and the appearance shall be entered, and the like proceedings be had as on original bills, so far as they have not before taken place, or in the manner provided by statute. Rule of Chancery, 21; 37 Maine Rep. 590. By rule of Chancery in Massachusetts, when any party shall die, a suggestion of the fact may be made in writing and entered on the docket, and it shall then be lawful for the clerk, during vacation, upon application, to issue process to bring into Court the representative of such deceased party. Rule 7. In New Hamp-

upon the party or parties, who, according to the present practice of the said Court, would be defendant or defendants to the bill of revivor or supplemental bill, shall from the time of such service be binding on such party or parties in the same manner in every respect as if such order had been regularly obtained according to the existing practice of the said Court; and such party or parties shall thenceforth become a party or parties to the suit, and shall be bound to enter an appearance thereto in the office of the Clerks of Records and Writs, within such time and in like manner as if he or they had been duly served with process to appear to a bill of revivor or supplemental bill filed against him; provided that it shall be open to the party or parties so served, within such time after service as shall be in that behalf prescribed by any General Order of the Lord Chancellor, to apply to the Court, by motion or petition, to discharge such order on any ground which would have been open to him on a bill of revivor or supplemental bill, stating the previous proceedings in the suit and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon: provided also, that if any party so served shall be under any disability other than coverture, such order shall be of no force or effect as against such party until a guardian or guardians *ad litem* shall have been duly appointed for such party, and such time shall have elapsed thereafter as shall be prescribed by any General Order of the Lord Chancellor in that behalf."

shire, "no proceeding in Equity shall be abated, if the person who shall become interested shall, on his petition, briefly setting forth his relation to the cause, be admitted to prosecute or defend as a party thereto; nor, if such person, upon petition of the adverse party, briefly stating his relation to the cause, shall be by order of the Court duly notified to appear therein. If the person so notified shall neglect to appear, the bill shall be taken as against him as confessed." Rule 28. 38 N. Hamp. 610. In the Courts of the United States, "whenever a suit shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the Clerk's office at any time; and upon suggestion of the facts, the proper process or subpoena shall, as of course, be issued by the clerk, requiring the proper representative of the other party to appear and show cause, if any he have, why the cause should not be revived. And if no cause be shown at the next rule day, which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course." Equity Rule, 66.

In order to carry out the provisions of the Act of Parliament, the 43d Order of August, 1852, directs the time within which a party under no disability may apply, and also the course of proceeding with respect to persons under disability. The Order is as follows : —

“ Any party under no disability, or under the disability of coverture, who may be served with an order to revive any suit, or to carry on the proceedings therein, may apply to the Court to discharge such order within twelve days after such service; and any party being under any disability, other than coverture, who may be so served, may apply to the Court to discharge such order within twelve days after the appointment of a guardian or guardians *ad litem* for such party; and until such period of twelve days shall have expired such order shall have no force or effect as against such last-mentioned party.”

These statutory enactments and orders apply “ when a suit becomes abated by death or marriage or otherwise, or defective by reason of some change or transmission of interest or liability.”

It is not, however, every death of a party that abates or renders a suit defective. If the whole interest or liability of the party dying, be he plaintiff or defendant, survives to or devolves upon other parties to the suit, no abatement takes place.

There are, however, provisions in Acts of Parliament to prevent the abatement of suits by the death of persons who sue not for their own individual interest, as assignees of bankrupts and some others.

The 157th section of 12 & 13 Vict. c. 106, enacts, “ That whenever an assignee shall die, or be removed, or a new assignee shall be chosen, no action at Law or suit in Equity shall be thereby abated, but the Court in which any action or suit is depending may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or new assignee to be substituted in the place of the former; and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees in the same manner as if he had originally commenced the same.” This section has been held to apply only to the assignees of a plaintiff.¹ In the case of an assignee defendant, a supplemental order to substitute his successor was granted as of course under the 52d section above set out.²

¹ *Man v. Ricketts*, 1 Phil. 617; 7 Beav. 484; *Bainbrigg v. Blair*, You. 386.

² *Gordon v. Jesson*, 16 Beav. 440. The case of *Heath v. Lewis*, 18 Beav. 527,

By the 17 & 18 Vict. c. 25, with respect to industrial and provident societies, it is enacted in the 4th section, "That no action, suit or other proceeding, by or against such societies, is to be abated by the death or change of the officer to sue and be sued, or by a change in the members of the society."

By the 15 & 16 Vict. c. 3, administration of the personal estates of intestates and others, when her Majesty is entitled, may be granted to the Solicitor of the Treasury for the time being, as nominee of her Majesty and successors; and by the 3d section of the same, when administration is so granted, the suit does not abate by the death or removal of the Solicitor of the Treasury, but may be continued by his successor.

By 7 Geo. IV. c. 46, s. 9, suits instituted by or against banking companies in the name of the public registered officer may, on his death, resignation or removal, be continued by or against any other public officer of the company for the time being.

Subject to the foregoing and some other particular exceptions particularly provided for, the rule is general, that the death of a plaintiff abates a suit, and that the same must be revived before any future proceedings can be taken.

The death of a defendant in like manner formerly produced in most cases a complete abatement, unless his interest or liability survived to or devolved upon a co-defendant, but as decrees may now be made in suits defective for want of parties, the rule is not so strict as it formerly was.

It may be stated generally that now, with respect to a defendant dying, the suit does not necessarily wholly abate, but only to the extent of his interest or liability. When a defendant dies, leaving several executors, it is necessary, to make the suit complete, to revive the suit in the manner prescribed by the last-mentioned section of the Act against such of the executors as prove the will.¹

Great expense was till recently occasioned by the necessity which the Court imposed of having the estate of every deceased person who was interested in the suit represented at the hearing. If no other representation had been taken out, it was frequently necessary for the plaintiff himself to take out administration for which decided that a supplemental bill must be filed, seems to be overruled according to *Pickford v. Brown*, 1 Kay & J. 643; and see more particularly, post, p. 1604.

¹ *Strickland v. Strickland*, 12 Beav. 463.

the purposes of the suit. To obviate this difficulty, it is enacted, by the 15 & 16 Vict. c. 86, s. 44, as follows:—

“If in any suit or other proceeding before the Court it shall appear to the Court that any deceased person who was interested in the matters in question has no legal personal representative, it shall be lawful for the Court either to proceed in the absence of any person representing the estate of such deceased person, or to appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the Court shall think fit, either specially or generally by public advertisements; and the order so made by the said Court, and any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such deceased person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interests to the protection of the Court.”

It is within the discretion of the Court either to act upon the foregoing section, or to decline proceeding with the suit until a regular representative of the estate in question is formally made a party. It appears that the Court will in general act upon this section when there is a difficulty in obtaining representation, and when the interest of the deceased defendant was not of very great consequence in the cause, but that it will not do so when the object of the suit is to administer the estate sought to be thus imperfectly represented.¹

Neither will the Court proceed without regular representation to the estate when the person to represent the estate would have the duties of a trustee to perform.²

It will be observed, that the words of the Act of Parliament as to the occasion when the Court can thus dispense with representations are as follows: “In any suit or other proceeding.” Consequently the Court can, either upon a claim or a special case, or in any summary proceeding, should it so think fit, act upon this section.³

¹ *Abrey v. Newman*, 10 Hare, 58; *Long v. Stone*, 1 Kay, App. 12; *Silver v. Stein*, 1 Drew, 295. It seems that the person who would be administrator *ad litem* is the proper party to appoint. *Dean of Ely v. Gayford*, 16 Beav. 561.

² *Fowler v. Bayldon*, 9 Hare, 28.

³ *Swallow v. Binns*, 17 Jur. 295; *In re Stewart*, 22 Law J., N. S., 369.

There is another section of the Act for amending the practice of the Court, affecting this branch of the practice of the Court, namely, the 49th of 15 & 16 Vict. c. 86;¹ by the concluding words of which it is enacted, that "when there is a misjoinder of plaintiffs, and the plaintiff having an interest shall have died, leaving a plaintiff on the record without an interest, the Court may, at the hearing of the cause, order the cause to stand revived as may appear just, and proceed to a decision of the cause if it shall see fit, and to give such directions as to costs or otherwise as may appear just and expedient."

The circumstances to which those words of the section refer are peculiar, and cannot often occur, but when they do so the Court will be able to revive a cause at once without any preliminary proceeding on behalf of any of the parties to the suit.

The causes of abatement hitherto considered have been the death of one of the parties, but the Act refers also to abatement by marriage. The marriage of a female plaintiff produces an abatement of the suit, which can be remedied by the process mentioned in the section set forth. The marriage, however, of a female defendant produces no such result, but the husband becomes a party to and is named in the subsequent proceedings without any order of the Court.

It will be recollected, that the section refers not only to abatement by death, marriage, or otherwise, but also to cases when the suit becomes "defective by reason of some change or transmission of interest or liability." It is therefore necessary to consider what was the previous practice as to suits becoming so defective.

If after a suit was instituted, any circumstance occurred which, without abating the suit, occasioned an alteration in the interest of any of the parties, or rendered it necessary that new parties should be brought before the Court, the proper method of doing it was by supplemental bill.² Thus, if pending a suit affecting an

¹ Ante, p. 306, note 1; *Clements v. Bowes*, Dr. 684.

² Lord Red. 63. See *Thompson v. Hill*, 5 Yerger, 418; *Campbell v. Browne*, 5 Paige, 34; *Carow v. Mowatt*, 1 Edw. Ch. 9. Matters which have occurred since the original bill was filed, and which are material to perfect the plaintiff's case, may be introduced into the record, by supplemental bill. Story Eq. Pl. § 335, § 336, and note; *Greenleaf v. Queen*, 1 Peters, 148; *Candler v. Pettit*, 1 Paige, 168; *Stafford v. Howlett*, 1 Paige, 200.

When any event happens subsequently to filing an original bill, which gives a new interest or right to a party, it should be set out in a supplemental bill. Saun-

estate which was the subject of an entail, a tenant in tail, whose interests were likely to be affected by it, came into *esse*, he was brought before the Court by a supplemental bill.¹ So in a suit relating to the personal property of a married woman, where a decree or order had directed a settlement on the wife and her children, but before the completion of the settlement the wife died, it was held, that the children had a right to the benefit of the settlement, and to assert that right by supplemental bill.²

So, also, where a bill was exhibited against a man and his wife, and the husband died pending the suit, and a new interest thereupon arose to the wife, a supplemental bill was filed for the purpose of giving the wife an opportunity of putting in another defence in respect of her newly-acquired interest.³

ders v. Frost, 5 Pick. 276; *Gove v. Lyford*, 44 N. Hamp. 528. A supplemental bill must follow the original complaint and set forth actual and subsequent damages arising from the same cause set forth in the bill. *Bardwell v. Ames*, 22 Pick. 375; Story Eq. Pl. § 336, § 339. An original bill cannot be amended by incorporating anything therein, which arose subsequently to the commencement of the suit. This should be stated in a supplemental bill. *Stafford v. Howlett*, 1 Paige, 200, 201. A plaintiff cannot file a supplemental bill to introduce facts which have occurred since the filing of the original bill, and upon which a decree can be had without reference to the original bill. The plaintiff should dismiss his original bill and file an entirely new one. *Milner v. Milner*, 2 Edw. Ch. 114. Wherever the Court, in a proper case, has given a party leave to file a supplemental bill, they will permit other matters to be introduced into the supplemental bill, which might have been incorporated in the original bill by way of amendment. *Stafford v. Howlett*, 1 Paige, 200, 201.

The reader is to be reminded, that a plaintiff cannot support a bad title, by acquiring another after the filing of the original bill, and then bringing it forward by supplemental bill. *Tonkin v. Lethridge*, Cooper's Rep. 43; *Byrne v. Byrne*, 1 Con. & Law. 189, S. C. 1 Dru. & W. 71; *Winn v. Albert*, 2 Md. Ch. Dec. 42. If an original bill is wholly defective, and there is no ground for proceeding upon it, it cannot be sustained by filing a supplemental bill, founded upon matters which have subsequently taken place. *Candler v. Pettit*, 1 Paige, 168; *Land v. Cowan*, 18 Ala. 297; *Vaughan v. Vaughan*, 30 Ala. 329. But if, on the other hand, the original bill is sustainable, and the supplemental bill only enlarges the extent and changes the kind of relief, the latter may be sustained. *Jaques v. Hall*, 3 Gray, 194; *Mutter v. Channel*, 5 Russ. 42; *Edgar v. Clevenger*, 2 Green Ch. 258; *Hasbrouck v. Shuster*, 4 Barb. Ch. 285. Thus, the plaintiff in a bill to enforce a trust in which he and his children are interested, may by supplemental bill enforce rights acquired by him by assignment from his children since the original bill was filed. *Jaques v. Hall*, *supra*.

¹ *Jones v. Jones*, 3 Atk. 217.

² *Groves v. Clarke*, 1 Keen, 132; *Murray v. Lord Elibank*, 10 Ves. 84

³ See ante, p. 148.

If a plaintiff, suing in his own right, made such an alienation of his property as to render the alienee a necessary party to the suit, but not at the same time to deprive himself of all right in the question, he brought the alienee before the Court by supplemental bill, or the alienee might himself file a supplemental bill against the original plaintiff and the other parties to the suit, to have the benefit of the proceedings.¹

In like manner if a plaintiff, suing in his own right, was entirely deprived of his interest, but was not the sole plaintiff, the defect arising from this event was supplied by a bill of this kind.² Therefore if, after the bill filed, one of several plaintiffs totally alienated his right in the subject-matter, or became bankrupt, so that his interest became vested in his assignees, a supplemental bill was filed by the remaining plaintiffs, either against or in conjunction with the alienee or assignees, to carry on the suit.

Upon the same principle it was held, that if a plaintiff became a lunatic, a supplemental bill was filed in the joint names of the lunatic and his committee;³ or if, after the institution of the suit by a lunatic and his committee, the committee died and a new committee was appointed, the suit was continued by a supplemental bill on behalf of the lunatic and his new committee.

It is to be recollected here, that an assignment or alienation, *pendente lite*, is not permitted to affect the rights of the other parties, unless the alienation disables the party from performing the decree of the Court, as in the case of an assignment by a mortgagee of his interest in the mortgage, pending a suit to redeem, in

¹ See *Binks v. Binks*, 2 Bligh, 593. A party, who acquires an entirely new right or interest in the subject-matter of the suit, by purchase, pending the litigation, may bring such right or interest before the Court by supplemental bill, or by an original bill in the nature of a supplemental bill. And unless he makes himself a party, by filing a supplemental bill, he will not be allowed to come in and take a part in the proceedings in the cause without the consent of the other parties to the suit. *Wilder v. Keeler*, 3 Paige, 164. A new defendant cannot be added to a suit on petition. It must be done by a supplemental bill. *Carow v. Mowatt*, 1 Edw. Ch. 9.

Where a plaintiff assigns his interest in the subject-matter of the suit *pendente lite*, either absolutely or conditionally, and obtains a re-assignment thereof before any further proceedings are had in the cause, it is not necessary to bring the temporary assignee before the Court; but the party may proceed in the same manner as if no such assignment had been made. *Scouten v. Bender*, 1 Barb. Ch. 647.

² Lord Red. 63.

³ Ante, p. 81.

which case the assignee must be brought before the Court by supplemental bill.¹

Where, however, the assignment, *pendente lite*, was of an equitable interest, and not, as in the case of bankruptcy, by operation of law, there was not any absolute necessity for the assignee to be brought before the Court, nor does it seem to be material, whether the assignee was a plaintiff or defendant to the bill.²

In such a case, however, unless the alienee can be protected by the ordinary course of petitioning for an order that the alienor may not take the fund he is entitled to in the suit out of Court, without notice to him, he, the alienee, usually made himself a party to the suit by supplemental bill against the other parties.³ This was generally necessary wherever the alienee wishes to attend under a decree,⁴ though it seems that even in such cases the Court, under the old practice, gave permission to the purchaser, *pendente lite*, of the interest of a party to attend without filing a supplemental bill to establish his right. The order was, however, qualified so as not to prevent the plaintiff from having any remedies he might be entitled to against the purchaser. The order in such case was at the expense of the purchaser.⁵

If the interest of a plaintiff, suing in *autre droit*, entirely determined by death or otherwise, and some other person thereupon became entitled to the same property under the same title, as in the case of an executor or administrator upon the determination of an administration *durante minori etate*,⁶ or *pendente lite*,⁷ the suit was added to or continued by supplemental bill.

Formerly the rule was the same in cases of bankruptcy or insolvency; in which case, if a plaintiff, an assignee, died or was removed pending a suit, and a new assignee was appointed, a supplemental bill was necessary; but the necessity for a supplemental bill, in such cases, has now for some time been obviated.⁸

It is to be remarked, that in the cases above put, viz., of those which effect only a partial change in the interest of the plaintiffs,

¹ Lord Red. 74.

² Eades v. Harris, 1 Y. & C. 235.

³ Foster v. Deacon, Mad. & Geld. 59; Wright v. Meek, 3 Iowa, 472.

⁴ See Wilder v. Keeler, 3 Paige, 164.

⁵ Toosey v. Burchell, Jac. 159.

⁶ Jones v. Basset, Prec. in Ch. 174; Stubbs v. Leigh, 1 Cox, 133.

⁷ Lord Red. 64; Story Eq. Pl. § 340 and note.

⁸ See ante, 1591.

or of one of the plaintiffs, the parties to the suit are still, to a certain extent, able to proceed with it, though from the effect of the change of interest, occasioned by the subsequent event, the proceedings are not sufficient to attain their full object: also, that, in the case of the death of the party suing in *autre droit*, if the suit is continued by the individual succeeding to the character of the deceased plaintiff, there is no change of interest which can affect the parties, but only a change of the person in whose name the suit must be prosecuted.¹

A material distinction prevailed under the old practice, which remains of some consequence under the present new regulations. It is to this effect: "Where a sole plaintiff, suing in his own right, was deprived of his whole right in the matters in question by an event subsequent to the institution of the suit, as where a plaintiff assigned his whole interest to another, the plaintiff was no longer able to prosecute for want of interest, and his assignees claiming by a title which might be litigated, the benefit of the proceedings could not be obtained by means of a supplemental bill, but was sought by what was called an original bill in the nature of a supplemental bill."²

This distinction was not artificial, but was attended by a considerable difference in its practical results;³ for in those cases in which a supplemental bill only was filed, if there had been no decree, the suit might proceed after the supplemental bill had been filed, in the same manner as if the original plaintiff had continued such; but, in the case of an original bill in the nature of a supplemental bill, the whole case was open: "a new defence might be made, the pleadings and depositions could not be made use of in the same manner as if filed or taken in the same cause, and the decree, if any had been obtained, was no otherwise of advantage than as it might be an inducement to the Court to make a similar decree."⁴ Whilst in the case of a mere supplemental suit, the benefit of the original decree, if obtained, was expressly given to the new plaintiff by the supplementary decree, and he was declared entitled to stand in the place of the plaintiff in the original

¹ Lord Red. 64.

² Ibid. 65; and see post; Story Eq. Pl. § 349; Sedgwick v. Cleveland, 7 Paige, 287, 290.

³ See Story Eq. Pl. § 345, 346.

⁴ Lord Red. 64; Attorney-General v. Foster, 2 Hare, 81; S. C. 13 Sim. 282.

bill, and to have the benefit of the proceedings upon it, and to prosecute the decree, and to take the steps necessary to render it effectual.¹

The authorities are not quite clear as to the cases when the transmission of interest of a sole plaintiff rendered the one or the other forms of proceedings applicable, but there seems no doubt that wherever the interest of a plaintiff was transmitted by act of Law to a person who thereupon sued under the same title, the person on whom it so devolved was entitled to the benefit of the former proceedings in the suit, or, in other words, might file either a simple bill of revivor or a common bill of supplement.

Moreover, when the plaintiff sued in *autre droit* and his interest determined, his successor representing the same interest might proceed by a simple bill of supplement, and this rule applied although he did not claim under the former plaintiff.²

We have now to consider the case where a new party came in by the same title as the original plaintiff, but did not claim directly by assignment from him; thus, where a tenant in tail succeeded to a title to sue in Equity, upon the death of a preceding tenant in tail. In this case he might proceed by supplemental bill, by way of continuation of the original suit;³ nor did it make any difference, provided he came in under the same title, that he came in by force of a new limitation in remainder, upon the determination of a preceding estate tail; he, in such case, was entitled to continue the suit in the same manner as a tenant in tail coming in by succession as issue in tail.

This doctrine is fully investigated by Lord Eldon, in the case of *Lloyd v. Johnes*,⁴ and the result seems to be, that it is only on the ground that a tenant in tail is supposed to represent the inheritance and the interests of all those claiming in remainder after him, that a remainderman coming in after the determination of the estate tail of the first plaintiff was permitted to carry on the same suit by supplemental bill, instead of being driven to his original bill; when, therefore, this ground failed, and the estate of the original plaintiff was less than an estate tail, *e. g.*, an estate for life, a person coming in upon a remainder, on the determination

¹ Lord Red. 65; *Attorney-General v. Foster*, 2 Hare, 81; S. C. 13 Sim. 282.

² Ante, p. 1597.

³ *Lloyd v. Johnes*, 9 Ves. 37.

⁴ 9 Ves. 57; and see Lord Red. 72.

of such prior estate, could not continue the suit, but must commence *de novo*, by original bill in the nature of a supplemental bill.

So, also, an ecclesiastical person succeeding to a benefice, if he wished to obtain the benefit of proceedings instituted by his predecessor,¹ must have filed an original bill in the nature of a supplemental bill.

It is to be observed, that it is only in those cases where the remainderman comes in upon the same title as the former plaintiff, that he will be permitted to sustain a simple supplemental suit. In *Lloyd v. Johnes*,² which has been already so frequently referred to, Lord Eldon says — “I distinguish between cases where the suit is founded on contract by the tenant in tail, and a suit to bind the land in respect of charges created by the author of the gift;”³ and, in *Tonkin v. Lethbridge*,⁴ he determined, that another title accruing since the filing of the original bill will not enable even the same person to carry on a suit by simple supplemental bill, in a case where the title upon which he originally proceeded had failed.

The same principle which applies to suits *by* a tenant in tail applies where the suit is *against* him; and, therefore, if a bill claimed a charge upon the whole inheritance in strict settlement, and the first tenant in tail in being is made a party defendant, and he dies without issue, all the proceedings might be had against the second tenant in tail, as if he had been originally a party, by means of a supplemental bill.⁵ So, also, where a bill is filed for the purpose of raising a charge against the inheritance, divided into estates tail, against a remote remainderman, those intermediate not being yet *in esse*; if, after the cause has proceeded to a certain length, an intermediate remainderman comes into *esse*, the course is to file a supplemental bill against him, stating the former proceedings, and such statement is held sufficient to put the facts originally in issue, — in issue with regard to such defendant; and he may even have the benefit of the depositions of any witnesses that

¹ Lord Red. 72.

² 9 Ves. 57.

³ See *Sedgwick v. Cleaveland*, 7 Paige, 290 to 292; Story Eq. Pl. § 351.

⁴ Cooper's Rep. 43; see also *Pritchard v. Draper*, 1 R. & M. 191; *Davidson v. Foley*, 3 Bro. C. C. 598; and ante, p. 1597.

⁵ *Lloyd v. Johnes*, 9 Ves. 58.

may have been already examined, if the witnesses should die.¹ The rule in this case, as applied to a defendant, is subjected to the same qualification that it is subject to where the tenant in tail is plaintiff, viz., that where a tenant in tail takes a different interest, or rather a similar interest not affected by the same circumstances, it is competent, both for and against him, to bring forward the equities belonging to those different circumstances, as contradicting his case.

The reader is to be reminded, in this place, that when there is a decree against a tenant in tail, and he dies without issue, a subsequent remainderman may appeal from the decree; for which purpose, however, he must make himself a party to the original suit by supplemental bill, praying to have the benefit of the proceedings, for the purpose of appealing from the decree.²

"If by any event, the whole interest of a defendant is entirely determined, and the property is become vested in another, by a title not derived from the former party, as in the case of succession to a bishopric or benefice, or of the determination of an estate tail, and the vesting of a subsequent remainder in possession, the benefit of the suit against the person becoming entitled by the event described must be obtained by original bill in the nature of a supplemental bill."³

This rule, however, is only applicable when the estate or interest of the defendant is actually determined, and a new estate or interest accrues to another party. Where the estate or interest of the defendant is not determined, but only becomes vested in another, by an event subsequent to the institution of the suit; as in the case of alienation by deed,⁴ the defect in the suit may be supplied by supplemental bill, whether the suit is become defective merely, or abated as well as defective.⁵

¹ Ibid. 60; query, whether the death of the witnesses is, in such case, necessary to entitle the new defendants to the benefit of their depositions?

² *Giffard v. Hort*, 1 Sch. & Lef. 386, 410.

³ Lord Red. 67; Story Eq. Pl. § 350 and note.

⁴ It is to be recollected, that with respect to purchasers or incumbrancers becoming such after the bill filed, they will be bound by the decree, whether the plaintiff have notice of them or not; and, therefore, they need not be brought before the Court by supplemental bill, unless the legal estate has become vested in them, of which it is necessary to procure a conveyance.

⁵ See Story Eq. Pl. § 342; *Sedgwick v. Cleaveland*, 7 Paige, 290. For in these cases the new party comes before the Court exactly in the same plight and

The same rule also applies to cases where the interest of a person, sued in *autre droit*, is determined pending the suit, as in the case of an administration *durante minori ætate* or *ad litem*, or of an executor *pendente lite*.

It is to be observed that, till the appearance of a defendant to the bill, there is, strictly speaking, no cause in Court as against that defendant,¹ therefore, if the interest of a defendant, named as a party to the original bill, should determine before such defendant should have appeared, the suit cannot be continued, against the person in whom his interest has become vested, by a mere supplemental bill; but an original bill in the nature of a supplemental bill must be filed, which, although merely supplemental against the other defendants, must pray that the new party may answer the original bill as well as the supplemental matter, and pray distinct relief to which the plaintiff may consider himself entitled against the new defendants.²

It has always been the rule, that, when a defendant becomes bankrupt after decree, his assignees cannot, by petition, obtain leave to attend, upon taking the account under the decree; they must either wait till the plaintiff brings them before the Court by supplemental bill, or file a supplemental bill themselves.³

With respect to creditor's suit the course was, where the creditor who filed the bill died, for his representative to revive the condition as the former party, is bound by his acts, and may be subject to all the costs of the proceedings from the beginning of the suit. But the distinction is constantly to be borne in mind between cases of voluntary alienation and cases of involuntary alienation, as by the insolvency or bankruptcy of the defendant. In the latter cases, the assignee must be made a party; in the former, he may or may not, at the election of the plaintiff. *Sedgwick v. Cleaveland*, 7 Paige, 290, 201; *Story Eq. Pl. § 342*; *Penniman v. Norton*, 1 Barb. Ch. 246. But the Court cannot, upon a mere petition in the original suit, make a personal decree or order against a purchaser *pendente lite*, who is not a party to the suit, whereby property not in litigation in such suit can be affected; but to reach and affect such property, a new or supplemental bill against such purchaser is necessary. *Livingston v. Freeland*, 3 Barb. Ch. 510.

¹ See *Heard v. March*, 12 Cush. 580, 583.

² *Asbee v. Shipley*, Mad. & Geld. 296; see also *Crowfoot v. Mander*, 9 Sim. 396; *Stewart v. Nicholls*, 1 Taml. 307. In Massachusetts, the executors of a deceased defendant to a bill in Equity may be brought in by a bill of revivor, although no service had ever been made on the testator. *Heard v. March*, 12 Cush. 580.

³ In such a case, however, the assignee should first apply to the plaintiff to file a supplemental bill; *Philipps v. Clark*, 7 Sim. 231.

suit, which he could as of course.¹ If the representative did not revive the suit, it was almost a matter of course to permit another creditor, who had come in under the decree and established his claim as creditor, to take up the proceedings by supplemental bill.²

It is to be observed, however, that as the representative of the deceased creditor has an interest in the prosecution of the suit, in respect of the costs already incurred in it, no other creditor was at liberty to file a supplemental bill, without notice to such representative; and that the proper course was for the creditor desiring to prosecute the suit, to move that he might be at liberty to file a supplemental bill, if the representative of the deceased plaintiff did not revive within a limited time, and serve such order upon the representative.³

It seems that the motion for leave to file the supplemental bill was made upon notice, served both upon the representatives of the former plaintiffs, and upon the defendant; and that it was held, that if the defendant had any objection to urge to the supplemental bill being filed, he should have taken that opportunity of stating it to the Court, and should not have waited to do so till he put in his answer to the supplemental bill.⁴

What has been stated concerning the former practice will be sufficient to make the new enactments and orders intelligible. In the first place we have seen how, upon an abatement taking place, the present practice provides for an order to revive being obtained. There is no doubt that this section⁵ will apply in all cases when, under the former practice, a simple bill of revivor was the proper course; but the section goes further than this, and applies in terms to cases where the suit has become defective by reason of "some change or transmission of interest and liability:" and it also provides, not only for an order to revive, but also for the "order to the effect of the usual supplemental decree." There were for some time doubts whether a supplemental order under this section could be obtained before decree, but it has been de-

¹ *Livesey v. Livesey*, 1 R. & M. 10.

² *Houlditch v. Marquis Donegal*, 1 S. & S. 491; *Dixon v. Wyatt*, 4 Mad. 392.

³ *Dixon v. Wyatt*, 4 Mad. 392.

⁴ *Ubi supra*.

⁵ *Ante*, p. 1589.

cided that it can ;¹ and it would seem, therefore, that this section will apply to all cases when, under the former practice, upon a transmission of interest or liability, a simple supplemental bill could have been filed, and the plaintiff was thereby entitled to the benefit of the proceedings already taken place,² whether the defect occur before or after decree. Thus the section will apply, and an order to the effect of the usual supplemental decree will be obtained, on the birth of a child, who is a member of a class beneficially interested.³

So, upon the marriage of a female plaintiff, an order to the effect of the usual supplemental decree may be obtained under this section against the trustees of the settlement ;⁴ or in the case of the bankruptcy of a plaintiff, a creditor whose debt has been found due may revive or obtain an order to carry on the suit,⁵ and a surviving plaintiff may obtain an order of revivor and supplement against the executors and devisees of his deceased co-plaintiff.⁶

In the case of *Lash v. Miller*, cited below, an order was made that the plaintiff might prosecute the suit against the assignees of a defendant become bankrupt after appearance, but before answer, with liberty for the assignees to answer if they should be so advised ; and the Lord Chancellor observed, that after decree the application would have been a matter of course.

After service of an order under this section, if the defendant do not appear it is not necessary for the plaintiff to enter an appearance for him, but the suit may proceed in his absence.⁷

If the defect be one which cannot be cured by an order under the 52d section, it will be necessary either that a bill of supplement under the old practice should be filed, or that resort should

¹ *Lash v. Miller*, 4 De G., Mac. & Gor. 841 ; *Pickford v. Brown*, 1 Kay & J. 643 ; *Hall v. Clive*, 20 Beav. 575.

² *Martin v. Hadlow*, 9 Hare, App. 52, where an order to revive and carry on the proceedings was made in an administration suit. In the case of *Tate v. Leithead*, 9 Hare, 51, when more than the usual supplemental decree was required, leave was given to file a supplemental claim.

³ *Fullerton v. Martin*, 1 Drew. 238 ; *Pickford v. Brown*, *ubi supra*.

⁴ *Atkinson v. Parker*, 2 De G., Mac. & Gor. 221.

⁵ *Lowes v. Lowes*, 2 De G., Mac. & Gor. 784 ; *English v. Hayman*, 9 Hare, App. 88.

⁶ *Clive v. Hall*, *ubi supra*.

⁷ *Ward v. Cartwright*, 10 Hare, App. 73.

be had to the remedy given by another section of the statute which will be next considered.

By section 53 of the 15 & 16 Viet. c. 86, it is enacted, that "It shall not be necessary to exhibit any supplemental bill in the said Court for the purpose only of stating or putting in issue facts or circumstances which may have occurred after the institution of any suit; but such facts or circumstances may be introduced by way of amendment into the original bill of complaint in the suit, if the cause is otherwise in such a state as to allow of an amendment being made in the bill, and if not the plaintiff¹ shall be at liberty to state such facts or circumstances on the record in such manner and subject to such rules and regulations with respect to the proof thereof, and the affording the defendant leave and opportunity of answering and meeting the same, as shall in that behalf be prescribed."²

To carry out this section of the statute the 44th Order of August, 1852, directs, that "If the plaintiff in any cause which is not in such a state as to allow of an amendment being made in the bill shall desire to state or put in issue any facts or circumstances which may have occurred after the institution of the suit, he may state the same, and put the same in issue by filing in the Record and Writ Clerks' Office a statement, either written or printed, to be annexed to the bill; and such proceedings, by way of answer, evidence or otherwise, are to be heard and taken upon the statement so filed as if the same were embodied in a supplemental bill: provided always, that the Court may make any order which it shall think fit for accelerating the proceedings thereunder, or proceedings therein, in any matter which may appear just and practicable."³

¹ A defendant to whom the conduct of the cause had been given was not allowed to do this. *Lee v. Lee*, 9 Hare, App. 91; 10 Hare, App. 72.

² A supplemental bill may be brought on behalf of the defendant in the suit. Where the matter is newly discovered evidence on the part of the defendant after the cause is at issue, or after publication is passed, or even after a hearing or decree, the defendant may, by a petition to file a supplemental bill, obtain relief, and an order allowing him to introduce the new evidence, either by putting the new matter at issue, or by enlarging publication, or by a rehearing, as the particular stage of the cause, at which the discovery is made, may require. *Story Eq. Pl.* § 337 *a*; *Baker v. Whiting*, 1 *Story C. C.* 232, 233.

³ By the 57th Equity Rule of the United States Courts, whenever any suit in Equity shall become defective, from any event happening after the filing of the bill, (as for example, by a change of interest in the parties,) or for any other

It was a rule of the Court, before the enactment of the 53d section, that matters which occurred after the institution of the suit could not be introduced by amendment; the earlier part of this section applies to that rule, and enables such matters to be inserted in the bill by amendment.¹ If the bill cannot be amended, then a supplemental statement may be filed.² The latter part of

reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any Judge of the Court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto, on the next succeeding rule day after the supplemental bill is filed in the Clerk's office, unless some other time shall be assigned by a Judge of the Court.

¹ *Tudway v. Jones*, 1 Kay & J. 691. See *Rogers v. Solomons*, 17 Geo. 598.

² Nothing, which occurred prior to the filing of the original bill, ought to be added by way of supplement, unless the state of the cause is such that an amendment can no longer be obtained; but when the original bill cannot properly be amended, any new matter necessary to be put in issue can be introduced by supplemental bill. *Goodwin v. Goodwin*, 3 Atk. 370; *Story Eq. Pl. § 333*. But a supplemental bill will not be allowed when the matter alleged therein could not under any circumstances have been introduced as an amendment to the original bill. *Clark v. Hull*, 31 Miss. (2 George,) 520; *Veazie v. Williams*, 3 Story C. C. 54; *Dodge v. Dodge*, 9 Foster (N. H.) 177.

In *Pedrick v. White*, 1 Metcalf, 76, it was held that to warrant the filing of a supplemental bill, it should be shown to the Court, either 1st, That the matter, relied upon as supplemental, arose after the original suit was commenced; or, 2d, That the facts relied upon first came to the plaintiff's knowledge, or were made known to him in such a manner, that he could avail himself of them, after the cause had passed the stage in which he might have had leave to amend; or, 3d, That the plaintiff has been prevented, through inadvertence, misapprehension, &c., of himself, agents, or his counsel, or other cause satisfactorily shown, from availing himself of the proposed matter of his supplemental bill, at an earlier stage of the cause. See *Candler v. Pettit*, 1 Paige, 168; *Stafford v. Howlett*, 1 Paige, 201; *Welf. Eq. Pl. 188*; *Walker v. Gilbert*, 7 Sm. & Marsh. 456.

A supplemental bill, introducing new facts relating to the merits, ought not to be filed, as a matter of course, but only by leave of the Court, upon sufficient cause shown by affidavit or other satisfactory proof. *Tappan v. Evans*, 12 N. Hamp. 330; *Pedrick v. White*, 1 Metcalf, 76; *Eager v. Price*, 2 Paige, 333; *Lawrence v. Bolton*, 3 Paige, 294; *Story Eq. Pl. § 333*; *Dias v. Merle*, 4 Paige, 259; *Winn v. Albert*, 2 Md. Ch. Decis. 42. Such is the practice in New York relating to injunction bills at least. *Eager v. Price*, *Lawrence v. Bolton*, *ubi supra*. And it is said to be most safe to apply for leave in all cases. 1 Hoff. Ch. Pr. 403. On an *ex parte* application for leave to file a supplemental bill, the Court examines the question so far as to see that the privilege is not abused for the purposes of delay and vexation to the defendant. *Eager v. Price*, 2 Paige, 333. In

the Order is not however frequently acted upon when an abatement takes place, as it has been held that a supplemental statement cannot be filed for the purpose of bringing forward new parties.¹ The object of such a statement seems to be simply to strengthen the case of the plaintiff by putting in issue new matter with reference to the decree originally asked for, but it is not a document by which the plaintiff can obtain a different decree, rendered necessary by subsequent events, or by which he can bring before the Court new parties.

In cases, therefore, to which the 52d section does not apply, and when the plaintiff also requires new parties to be brought before the Court, so that he cannot simply file a supplemental statement, he must fall back upon the old practice and file a supplemental bill or claim, and obtain a decree. It will, therefore, be necessary to state the former practice in supplemental bills of the description now to be considered.²

With respect to the form of a supplemental bill the 49th Order of August, 1841,³ directs, "That it shall not be necessary, in any bill of revivor or supplemental bill to set forth any statements in the pleadings in the original suit, unless the special circumstances of the case may require it."⁴

a doubtful case the Court may direct notice to be given of the application to the defendants, who have appeared. *Ib*; *Winn v. Albert*, 2 Md. Ch. Dec. 42. The application may be made either by motion or petition. A bill of this nature ought to be filed as soon as the new matter sought to be inserted therein is discovered. And if the party proceeds to a decree after the discovery of the facts upon which the new claim is founded, he will not be permitted afterwards to file a supplemental bill in the nature of a bill of review, founded on such facts. *Pendleton v. Fay*, 3 Paige, 204; *Story Eq. Pl.* § 338 a. If such bill is filed without any sufficient grounds, the defendant must make the objection by plea, answer or demurrer. *Lawrence v. Bolton*, 3 Paige, 294. *Fulton Bank v. New York and Sharon Canal Co.* 4 Paige, 127. A supplemental bill may be filed after publication is passed. *North Amer. Coal Co. v. Dyett*, 2 Edw. Ch. 115; *Pleasants v. Logan*, 4 Hen. & Munf. 489.

¹ *Heath v. Lewis*, 18 Beav. 527; *Commerell v. Bell*, 23 Eng. Law & Eq. 119. Neither can a supplemental statement be filed after decree. *Commerell v. Bell*, *supra*.

² *Dixon v. Wyatt*, 4 Mad. 495.

³ The Supreme Court of the United States have adopted the same rule. See *Equity Rules of January Term, 1842*, Rule 47.

⁴ In *Story Eq. Pl.* § 343, it is said, that "A supplemental bill must state the original bill and the proceedings thereon; and if the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event, and

This Order was never material, as the extent in which it was necessary in bills of this description to restate the pleadings in the original suit was still to be determined by the special circumstances of the case. As under the present practice in all simple cases, as for instance, in the case of bringing before the Court a child who upon its birth becomes a member of a class beneficially interested, it will be sufficient for the plaintiff to obtain an order to the effect of a supplemental decree by the simple process already mentioned under the 52d section, it may be inferred, that, in the cases where it still remains necessary to file a supplemental bill or claim, it will be incumbent to put in issue as against the new defendant all the material facts of the original bill. It will not, however, be necessary to state the original bill at length, as it has been held, under the former practice, that a very brief statement is sufficient to put the whole case in issue as against the new defendants.¹

Thus, in *Vigers v. Lord Audley*,² it was held, that, where a supplemental bill is filed against a new defendant, it is not necessary to state in it all the circumstances of the case at length; all that is requisite is, that the plaintiff should state so much of the case as shows that he has an equity against such defendant.

With respect to the parties to a supplemental bill, if the bill has been rendered necessary by an alteration of interest of a defendant, or by a person coming in *esse* who is necessary to be made a defendant, the supplemental bill may be exhibited, by the plaintiff in the original suit, against such person alone, and may pray a decree upon the particular supplemental matter alleged against that person only;³ unless, which is frequently the case, the inte-

the consequent alteration with respect to the parties; and in general, the supplemental bill must pray, that all the defendants may appear and answer to the charges it contains." *Mitford Eq. Pl. by Jeremy*, 76. See next note above.

¹ *Attorney-General v. Foster*, 2 Hare, 81.

² 9 Sim. 72.

³ A supplemental bill, for the purpose of bringing parties before the Court, who ought to have been parties to the original bill, may be filed at any period of the cause; and it is not unfrequently the case, that where a cause, at the hearing, has been ordered to stand over, with liberty to add parties, it has been expressly directed, that they should be added by supplemental bill; *Jones v. Jones*, 3 Atk. 110; though, even the ordinary direction on such occasion, that the plaintiff shall be at liberty to add parties by amendment, has been held to authorize the filing of a supplemental bill for that purpose. *Greenwood v. Atkinson*, 5 Sim. 419. See *Watt v. Crawford*, 11 Paige, 470. Where an objection, for want of parties,

rests of the other defendants may be affected by that decree, in which case such other defendants must be made parties.¹ In the case of *Dyson v. Morris*,² Sir J. Wigram, V. C., though not called upon to make an express decision upon the subject, stated his opinion to be "That the cases in which the parties to the original bill were necessary parties to a supplemental bill, were those in which the interest of the original defendants required, that such new parties should be before the Court, and that the cases in which the parties to the original bill were not necessary parties to the supplemental bill were those in which the new parties are brought before the Court in respect of the interest of the plaintiff, or of the new defendants. Acting upon this principle, in the case of *Jones v. Howells*,³ where a person not a party to the original suit was brought before the Court by supplemental bill for the purpose of litigating questions with the defendants to the original suit, Sir J. Wigram, V. C., held, that such last-mentioned defendants ought to have been parties to the supplemental bill. Where a supplemental bill is merely for the purpose of bringing formal parties before the Court as defendants, the parties defendants to the original bill need not, in general, be made parties to the supplemental,⁴ and the recent new rules concerning parties⁵ will, in most cases, prevent the necessity of making the parties to the original bill parties to the supplemental suit.

It may be mentioned here, that a new party, representing the interest of a former party, who comes before the Court by a sup-

is made out of season, the plaintiff, instead of amending the original bill, may file a supplementary bill, merely to bring in the parties wanting; and the defendants to the original bill need not, in such case, be made parties to the supplemental bill. *Ensworth v. Lambert*, 4 John. Ch. 605; Story Eq. Pl. § 334, 335. A supplemental bill for the purpose of adding new matter, or for bringing new parties before the Court, may be filed after as well as before the decree. Story Eq. Pl. § 338; *Jenkins v. Eldredge*, 3 Story C. C. 307; *Woodward v. Woodward*, 1 Dick. 53; *Boeve v. Skipwith*, 1 Eq. Cas. Ab. 80; 2 Ch. Rep. 142; *Dormer v. Fortescue*, 3 Atk. 142.

¹ Lord Red. 35; see also *Bignell v. Atkins*, Mad. & Geld. 369.

² 1 Hare, 413.

³ 2 Hare, 342; see also *Feary v. Stephenson*, 1 Beav. 42; *Pinkus v. Peters*, 5 Beav. 253; *Wilkinson v. Fowkes*, 9 Hare, 200.

⁴ Lord Red. 75; *Greenwood v. Atkinson*, 5 Sim. 419.

⁵ Ante, p. 181, note.

plemental bill, whether filed by himself or by the plaintiff, stands exactly in the same plight and condition as the former party, is bound by his acts, and may be subject to all the costs of the proceedings from the beginning of the suit,¹ therefore it has been held that a purchaser of the interest of a party, *pendente lite*, on filing his supplemental bill, comes into Court *pro bono et malo*, and is liable to the costs of the proceedings from the beginning to the end of the suit. So, also, the assignees of a bankrupt who are brought before the Court by supplemental bill may be liable to the costs of the whole suit, if they improperly resist the plaintiff's demand.² It would appear that the plaintiff might file interrogatories for the examination of the new defendant as well with respect to the new matter as also with respect to the contents of the original bill, for under the old practice³ such a defendant might have been called upon to answer both bills.

The proceedings upon a supplemental bill of this description are the same as the proceedings upon an original bill, and the defendant may adopt the same means of defence. Moreover, there are some objections which apply exclusively to proceedings of this description.

So also, according to the old practice, if a supplemental bill is brought on matter which arose before the original bill was filed and might have been introduced into the original bill, and this fact does not appear upon the supplemental bill, it may be pleaded.⁴

In a case of this kind, according to the present practice, the plaintiff might file a supplemental statement to which, probably, no objection could be taken.

Pleas and demurrers to supplemental bills are subject to the same rules both with respect to their form and substance, and to

¹ Lord Red. 68; Story Eq. Pl. § 342; *Sedgwick v. Cleaveland*, 7 Paige, 290, 291.

² *Whitcombe v. Minchin*, 5 Mad. 91.

³ *Vigers v. Lord Audley*, 9 Sim. 409. But, generally, a supplemental bill calls upon the defendant to answer the supplemental matter only. See *American Life Ins. and Trust Co. v. Bayard*, 3 Barb. Ch. 610; *Same v. Sackett*, ib.

⁴ See *M'Elwain v. Willis*, 3 Paige, 505; Story Eq. Pl. § 338 a; *Stafford v. Howlett*, 1 Paige, 200; *Lawrence v. Bolton*, 3 Paige, 294. If it does appear upon the supplemental bill, the defendant may demur. Lord Red. 202; *Stafford v. Howlett*, 1 Paige, 200; Story Eq. Pl. § 614.

the practice arising upon them, as pleas and demurrers to original bills.¹

If a defendant to a supplemental bill neither demurs nor pleads to it, he must put in his answer as in the case of an original bill.

A replication may be filed by the plaintiff to a supplemental bill, as in the case of an original bill. It is to be observed, however, that a separate replication in a supplemental suit is only necessary where there has been already a replication in the original suit. Where there has been no replication in the original suit, a general replication will apply to the whole record, and not merely to the original bill.

If the new matter in the supplemental bill is not admitted by the defendant's answer, it must be proved, otherwise the supplemental bill will be dismissed with costs. For this purpose, witnesses may be examined as to the new matter contained in the supplemental suit.²

It is to be recollected, that a supplemental suit is merely a continuation of the original suit,³ and that whatever evidence was properly taken in the original suit, may be made use of in both suits, even though not entitled in the supplemental suit; thus depositions taken in the original suit may be read at the hearing of both causes; and this was permitted in a case where the original bill was filed by the plaintiff, a married woman, in a wrong name, (*i. e.* as the widow of the testator, when her husband by a previous marriage was living,) and the object of the supplemental bill

¹ *Wright v. Vernon*, 1 Drew. 68. See Story Eq. Pl. § 338 *a*, 661; *Fulton Bank v. New York and Sharon Canal Company*, 4 Paige, 127. Whether, in case of a supplemental bill filed without leave of the Court, the objection should be taken advantage of by demurrer or motion to dismiss, was started, but not decided, in *Pedrick v. White*, 1 Metcalf, 76, 79. If a supplemental bill is filed without any sufficient grounds, the defendant may take the objection by plea or he may demur. *Lawrence v. Bolton*, 3 Paige, 294.

² *Wilkinson v. Fowkes*, 9 Hare, 592. The supplemental matter must be verified by affidavit or other satisfactory proof. *Pedrick v. White*, 1 Metcalf, 76.

³ A supplemental bill, when properly before the Court, is an addition to the original bill, and becomes part of it, so that the whole bill is to be taken as one amended bill. *Gillett v. Hall*, 13 Conn. 426; *Hill v. Hill*, 10 Alabama, 527; *Potter v. Barclay*, 15 Ala. 439; *Ramey v. Green*, 18 Ala. 771; *Cunningham v. Rogers*, 14 Ala. 147; *Harrington v. Slade*, 22 Barb. (N. Y.) 161. But when new parties are brought into Court by the supplemental bill, it is, as to them, a new suit. *Morgan v. Morgan*, 10 Georgia, 297.

was to correct this error, and to bring her husband before the Court.¹

If there has been no decree in the original suit before the supplemental bill is filed, the original and supplemental suit may come on for hearing together, (unless the supplemental bill is merely for discovery,) and one decree will be made in both.² But if a decree has been obtained before the event by which the supplemental bill was rendered necessary, though it be only a decree *nisi*,³ there must be a decree on the supplemental bill, for the which purpose the supplemental cause must be set down for hearing alone; or it may be heard with the original cause for further directions,⁴ in order to which, if necessary, the Court will, upon application, order the supplemental cause to be advanced.⁵

When after a decree new matter is discovered which might have been material in the original suit, a supplemental bill in the nature of a bill of review may in some cases be filed, but a bill of this description cannot be filed without leave of the Court having been first granted.⁶ In order to obtain permission for this purpose, a petition must be presented, supported by an affidavit to show that the "new matter could not be produced or used by the party claiming the benefit of it at the time when the decree was made. If the Court is satisfied that the new matter is relevant, and material, and such as might probably have occasioned a differ-

¹ *Giles v. Giles*, 1 Keen, 685.

² Lord Red. 64 - 75; *John v. Brown*, Seton on Decrees, 385; Story Eq. Pl. § 343.

³ Lord Red. 64.

⁴ Seton, 386; and see *Attorney-General v. Hurst*, *ibid.* 132.

⁵ *Ibid.*, and see Hand, 108. A supplemental bill may be filed, either before or after a decree, and may be in aid of a decree to help its being carried into full execution, or, that proper directions may be given on some matter omitted in the original bill, or not put in issue by it, or the defence made to it. *O'Hara v. Shepherd*, 3 Md. Ch. Dec. 306. A supplemental bill, after a decree, however, must not seek to vary the principles of the decree, but taking that as the basis, seek merely to supply any omissions there may be in it, or in the proceedings which led to it, so as to enable the Court to give full effect to its decision. *O'Hara v. Shepherd*, *supra*. If the supplemental bill has been improperly or unnecessarily filed, it will be dismissed at the hearing, although the plaintiff obtains a decree on the original bill. *Eager v. Price*, 2 Paige, 339.

⁶ *Hodson v. Ball*, 1 Ph. 177; *Davis v. Bluck*, 6 Beav. 393; *Hungate v. Gascoyne*, 2 Phil. 25; and see 1 Phil. 484; *O'Hara v. Shepherd*, 3 Md. Ch. Dec. 306.

ent determination, it will permit a bill of review to be filed.”¹ If a supplemental bill in the nature of a bill of review is filed without the leave of the Court, it may be taken off the file for irregularity.² The bill prays “That the cause may be heard with respect to the new matter made the subject of the supplemental bill at the same time that it is reheard upon the original bill, and that the plaintiff may have such relief as the nature of the case made by the supplemental bill requires.”³

The proceedings upon a bill of this description are the same as those upon original bills in general.

There is another description of bill known in practice, which, although classed by Lord Redesdale amongst bills in the nature of original bills, is still so far supplemental in its nature as to render a short notice of it, in this place, not improper. The bill alluded to is what is termed by Lord Redesdale, “*a bill to carry a decree into execution.*”⁴

A bill of this description is proper where, after a decree has been pronounced, it has happened that, owing to some neglect of the parties to proceed upon the decree, their rights have become so embarrassed by subsequent events, that no ordinary process of the Court upon the first decree will serve, and it is therefore necessary to have another decree of the Court to ascertain and enforce them. Thus, where a decree was pronounced against a defendant, to have a settlement delivered up, and a perpetual injunction, and afterwards the plaintiff died, having made a will, and thereby bequeathed all her estate to trustees, to be sold for the payment of her debts and legacies, the creditors and legatees were obliged to file a bill against the devisee of the former defendant, who was dead, to have the benefit of the decree obtained by the plaintiff, in

¹ Lord Red. 94. The passage quoted has reference to a bill of review, but the same proof is requisite to obtain leave for a supplemental bill in the nature of a bill of review, Lord Red. 91. See *Parkhurst v. Kinsman*, 2 Blatch. C. C. 72. So of a bill of revivor and supplement in the nature of a bill of review. *Pendleton v. Fay*, 2 Paige, 204.

² *Wilson v. Todd*, 1 M. & C. 42; *Newdigate v. Newdigate*, 8 Bligh, N. S. 474; *Toulmin v. Copland*, 2 Phil. 716.

³ Lord Red. 91.

⁴ Story Eq. Pl. § 429 to 432; *Grew v. Breed*, 12 Metcalf, 369.

order that the estate might be sold, and their debts and legacies paid.¹

Sometimes such a bill is exhibited by a person who was not a party, nor claims under any party, to the original decree, but claims in a similar interest, or is unable to obtain the determination of his own right till the decree has been carried into execution.²

A bill of this description may also be brought by or against a person claiming as assignee of a party to the decree. This appears to have been the nature of the bills in *Organ v. Gardiner*,³ and in *Lord Carteret v. Paschall*;⁴ and the case of *Binks v. Binks*⁵ may perhaps be considered as coming more within the description of this class of bills than that of a supplemental bill.

Such a bill may, also, be brought to carry into execution the judgment of an inferior Court of Equity, if the jurisdiction of that Court is not equal to the purpose.⁶

It is to be observed, that, in the case last referred to, the Court thought itself entitled to examine into the justice of the decision, though it had been affirmed in the House of Lords; and it is laid down, that, although where a decree is capable of being executed by the ordinary process and forms of the Court, whatever the iniquity of the decree may be, yet, till it is reversed, the Court is bound to assist it with the utmost process the course of the Court will bear; but where the common process of the Court will not serve, and things come to be in such a state and condition after a decree made, that it requires an original bill, and a second decree upon that, before the first decree can be executed, if the first decree is unjust, then this Court desires to be excused in making it its own act, and to build upon such foundations, and charging its own conscience with promoting an apparent injustice; and this obliges the Court to examine the grounds of the first decree, before it makes the same decree again.⁷

¹ *Johnson v. Northey*, Prec. in Ch. 134; S. C. 2 Vern. 407; see also 2 Chanc. Rep. 228.

² Lord Red. 95; and see *Rylands v. Latouche* and *Oldham v. Eboral*, 2 Bligh, 566; 1 Cooper's Sel. Cases, Temp. Brougham, 27.

³ 1 Ch. Ca. 231.

⁴ 3 P. Wms. 197; S. C. and see *Paschall v. Thurston*, 2 Bro. P. C. ed. Toml. 10.

⁵ 2 Bligh, P. C. 593.

⁶ Lord Red. 96; *Morgan v. —*, 1 Atk. 408.

⁷ See *Lawrence v. Berney*, 2 Chanc. Rep. 127; *Johnson v. Northey*, Prec. in

The question whether, upon a bill to carry a decree into execution, the propriety of the original decree might be examined, or impeached, or the decree varied, was much discussed before the House of Lords in *Hamilton v. Houghton*,¹ in which a decree, which was erroneous, was reversed upon a bill of this description, notwithstanding there had been a very long acquiescence.

It is to be observed, however, that although the original decree may be controverted upon a bill to carry it into execution, it is only the defendant in the new suit who can call it into question, the plaintiff never can ;² he must, if dissatisfied with the decree, impeach it either by bill of review or by some proceeding of that nature.³

In the case of *O'Connell v. M'Namara*,⁴ Lord St. Leonards said, "I do not understand the rule to be, that this Court is bound to carry into execution an erroneous decree ; on the contrary, I apprehend that when a party comes into this Court asking for the benefit of a former decree, he must be prepared to show, if the case requires it, that such decree was right." Accordingly he refused to give the plaintiff the benefit of the former proceedings unless he consented to take the proper decree.

With respect to the person who upon a suit becoming abated has a right to the benefit of the former proceedings, either by a simple order to revive or by a supplemental bill, the original practice seems still to continue.

Where an abatement of a suit takes place before decree, the only persons entitled to an order to revive, where the abatement has occurred by the death of a sole plaintiff, is the representative, real or personal, as the case may be, of such plaintiff,⁵ unless, in-

Ch. 134 ; S. C. 2 Vern. 407 ; *Attorney-General v. Day*, 1 Ves. 218 ; *Worden v. Gerard*, Lord Red. 96, n. ; *West v. Skip*, 1 Ves. 239.

¹ 2 Bligh, P. C. 169.

² *Robinson v. Robinson*, 2 Ves. 225, 232.

³ See *Shepherd v. Titley*, 2 Atk. 348.

⁴ 3 Dr. & Warren, 411.

⁵ See *Barribeare v. Brant*, 17 Howard (U. S.) 43. Where a bill for partition is filed, and the plaintiff subsequently dies, and his devisee thereupon files a bill to revive and continue the proceedings in the original suit, it is no objection to this last bill that the plaintiff is an infant, and was therefore incapable of commencing an original suit for the partition of lands. *McCasker v. Brady*, 1 Barb. Ch. 329.

deed, the bill was originally filed by the plaintiff in a representative capacity, viz., as executor or administrator of a person deceased, in which case the party to revive will be the individual in whom the representation of the deceased person is vested, and not the representative of the original plaintiff, unless such representative is also clothed with the character of representative of the original testator or intestate : thus, if a bill is filed by the administrator of a creditor who dies, the order to revive must be obtained not by his personal representative, but by the administrator *de bonis non* of the creditor.¹

If the abatement has occurred in consequence of the death of one of several plaintiffs, the suit may be revived by the representative of the deceased plaintiff, but it would appear that the surviving plaintiffs should be kept before the Court.²

In the case of a bill by a corporation sole, the death of the plaintiff occasions an abatement, but a material distinction arises with respect to the person entitled to revive or continue the suit. If the plaintiff was entitled to the subject-matter for his own benefit, the suit may be revived by his personal representative ; but if the plaintiff was only entitled in his corporate capacity, for the benefit of himself and successors, his successor is the person who ought to continue the suit, which he must do by means of a supplemental bill.

When the abatement is occasioned by the marriage of a female plaintiff, the suit may be revived by the husband and wife jointly ;³ or, if the property in litigation be the wife's separate property, the suit may be continued on the part of the wife by her next friend. In such case, however, a simple order to revive could probably not be obtained, but a bill of supplement would be required.

Where the abatement has occurred by the death of a defendant before decree, the suit can only be revived by the plaintiff or those claiming under him ; and it is to be observed that in no case, before decree, can a defendant or those claiming under him

¹ *Huggins v. York Buildings Company*, 2 Eq. Ca. Ab. 3 ; *Stewart v. Burrows*, Drury, 265 ; *O'Brien v. Mahon*, 2 Jo. & Lat. 201. If in a case of this nature a suit has been revived by a wrong party, the proper course to be pursued by the right party is to revive *de novo*, *ibid.* ; and see *Rylands v. Latouche*, 2 Bligh, 566.

² *Fallowes v. Williamson*, 11 Ves. 309 ; *Clare v. Cork*, 2 Y. & C. 131 ; *Finch v. Lord Winchelsea*, 1 Eq. Ca. Ab. 2 ; and *Livesey v. Livesey*, 1 R. & M. 10.

³ See *Boynton v. Boynton*, 1 Foster (N. H.) 246.

revive a suit.¹ We have seen, however, that in certain circumstances a defendant, though he cannot revive the suit, may obtain an order that the plaintiff or his representatives may revive within a limited time, or that the bill may be dismissed.²

It may be here observed, that the 39th Order of 1828, directs, "That where any cause shall become abated, or shall be compromised after the same is set down to be heard in either of the said two Courts, the solicitor of the plaintiff shall also certify the fact, as the case may be, to the Registrar of the Court where the cause is so set down, who shall cause an entry thereof to be made in his cause book."³

But although the general rule is strict, that before decree, a defendant cannot sustain a bill of revivor, the case is different after decree, and the suit may be revived at the instance of a defendant, if the plaintiffs, or those standing in their right, neglect to do it; for then the rights of the parties are ascertained, and plaintiffs and defendants are equally entitled to the benefit of the decree, and have a right to revive it.⁴

So also, if the abatement occur by the death of a defendant, the suit may be revived at the instance of his representatives.⁵

Attempts have been made to limit the right of a defendant to revive, to cases in which there has been a decree for an account, in support of which a *dictum* of Lord Hardwicke, in an anonymous case in *Atkyns*,⁶ has been relied upon; but it seems to be now held, that it is not in cases of account only that a defendant can revive, but that he may do so wherever he has an interest.⁷ He must, however, have some interest under the decree, that is, an interest in the further prosecution of the suit.⁸ Where the

¹ See *Aldridge v. Dunn*, 7 Blackf. 249.

² Ante, p. 810 *et seq.*; *Harrington v. Becker*, 2 Barb. Ch. 75.

³ If the solicitor neglect to do this, and the cause is set down before it is revived, the defendants will be entitled to the costs of the day. *Saner v. Deavin*, 14 Beav. 646.

⁴ Lord Red. 79; *Kent v. Kent*, Prec. in Ch. 197; 2 P. Wms. 263, n.; *Anon.* 3 Atk. 691; *Lady Stowell v. Cole*, 2 Vern. 296; *Lord Stowell v. Cole*, *ibid.* 219; *Story Eq. Pl.* § 372. After a decree to account, either party may revive. *Griffith v. Bronaugh*, 1 Bland, 548.

⁵ *Williams v. Cooke*, 10 Ves. 401.

⁶ 3 Atk. 691.

⁷ *Finch v. Lord Winchelsea*, 1 Eq. Ca. Ab. 2.

⁸ The Court will not, in general, permit a suit to be revived for the purpose of deciding the question of costs only; *Lord Red.* 201; *For. Rom.* 181; the general

object of the revivor is not to continue the suit, but merely to put an end to an injunction, and to be allowed to proceed at Law, a bill of revivor by the defendant will be liable to a demurrer,¹ and the defendant must proceed to get rid of the injunction in the ordinary way.²

It does not appear to have been deemed necessary for a defendant, who wishes to revive a suit after decree, to give notice of his intention to do so to the plaintiff's representatives.

It is to be observed, that the object of revivor by a defendant is merely to substantiate the suit, and to bring before the Court the parties necessary to see to the execution of the decree, and to be the objects of its operations, rather than to litigate the claims made by the several parties in the original pleadings, except so far as they remain undecided.³ And it does not appear, that the necessary effect of a revivor by a defendant will be to take from the plaintiff the conduct of the cause.

It will be recollected, that the order to revive must be served upon the parties who, according to the former practice, would have been parties to the bill of revivor or supplemental suit, which would have been necessary under the former practice to remedy the defect in the cause; consequently it will be necessary to inquire who were parties to such proceedings.

If the abatement was caused by the death or marriage of a sole rule being, that if a party die *before taxation* of costs, there can be no revivor in respect of costs only against his personal representatives. See Beames on Costs, (ed. 1840,) 131; Story Eq. Pl. § 371. But see *Travis v. Waters*, 1 John. Ch. 85. If the whole ground of the suit has been removed by the death of the plaintiff, the Court will not hear an argument merely to determine the question of costs. *Johnson v. Thomas*, 2 Paige, 377. The rule in regard to revivor for costs only does not, of course, apply where anything else is directed by the decree which remains unexecuted. For. Rom. 181; *Johnson v. Peck*, 2 Ves. 465. And the rule applies only to costs which remain *untaxed* at the time when the abatement takes place. *Lowten v. Colchester*, 2 Mer. 114; *Edgill v. Brown*, 1 Dick. 62; *Blower v. Morrets*, 2 Atk. 772. See Story Eq. Pl. § 370, 371. A bill of revivor cannot properly be brought upon a bill of discovery merely, after the answer is put in and the discovery is made; for in such a case the entire object of the suit has been obtained; and the plaintiff can have no motive for reviving it; and the other party has no interest in reviving it. Story Eq. Pl. § 371 *a*; *Horseburg v. Baker*, 1 Peters, 232, 236. A bill of revivor will not lie to revive a motion. *Hendrix v. Clay*, 2 A. K. Marsh. 464.

¹ *Horwood v. Schmedes*, 12 Ves. 311.

² *Ibid.* and see post, p. 1621.

³ Lord Red. 79.

plaintiff, and the suit is to be continued by the representatives of the original plaintiff, or by the husband and wife, all the defendants to the original bill were parties to it, and must therefore now be served with notice;¹ and so also, if the abatement was caused by the death or marriage of one of several plaintiffs, and the suit was continued by the surviving plaintiffs and the representatives of the deceased plaintiff,² or by the husband and wife in conjunction with the other plaintiffs. If the suit was continued, either by the surviving plaintiffs alone, or by the representatives of the deceased plaintiff alone, the representatives of the deceased plaintiff in the one case, or the surviving plaintiffs in the other, were made defendants to the bill of revivor, in conjunction with the original defendants: thus, if one of several tenants in common, plaintiffs, died, and a bill of revivor was filed by his representatives, the survivor, if not a co-plaintiff, must have been a defendant;³ and so, if in the case of the marriage of a female, one of several plaintiffs, the suit was continued either by the husband and wife alone, or by the other plaintiffs alone, the other plaintiffs in the one case, or the husband and wife in the other, must have been defendants as well as the original defendants.

Where the abatement was caused by the death of a defendant the only parties necessary to be made defendants to the bill of revivor were the representatives of the deceased defendant.⁴

Where a bill of revivor was filed, after decree, all persons interested in carrying the decree into execution were made parties to the bill of revivor.⁵

It is said, that if a bill be exhibited against *baron* and *feme*, and the husband dies, the suit is abated, and a bill of revivor must

¹ But if a defendant who has not answered is omitted, it will not be a ground of demurrer. *Oxburgh v. Fincham*, 1 Vern. 308.

² *Cave v. Cork*, 2 Y. & C. 130.

³ *Fallowes v. Williamson*, 11 Ves. 306.

⁴ Where the suit abates by the death of one of the original defendants, and a third party subsequently acquires the interest of the deceased party by purchase from his heirs before the revival of the suit against such heirs, the suit must be revived by a bill of revivor and supplement against the purchaser. *Harrington v. Becker*, 2 Barb. Ch. 75. It is said, that if a suit abates by the death of the defendant, the plaintiff may bring a new original suit, or a bill of revivor, at his election; for he may be able to make a better case than by his first bill: *Story Eq. Pl.* (3d ed.) § 354, note; but this would not be regarded as reasonable in a case where the defendant had answered. *Nicoll v. Roosevelt*, 3 John. Ch. 60.

⁵ *Metcalf v. Metcalf*, 1 Keen, 74.

be exhibited against the wife, because she is not obliged to abide by the answer which was put in for her under the power of her husband.¹ This, however, does not appear to be correct, unless where a new interest arises to the wife upon the death of her husband, in which case, as we have seen, a supplemental bill must be filed against the wife, for the purpose of affording her an opportunity of putting in another defence in respect of her newly-acquired interest.²

Where a man and his wife are defendants, if the wife dies, there will be an abatement of the suit, and the administrator of the wife must be made a party by revivor.³

It may be noticed here, that a suit which has become entirely abated may be revived as to part, only, of the matter in litigation, or as to part, by one bill, and as to the other part, by another : thus, if the rights of a plaintiff in a suit, upon his death, become vested, partly in his real and partly in his personal representative, the real representative may revive the suit so far as concerns his title, and the personal so far as his demand extends.⁴

But although a suit may be revived as to part of the matter in litigation, it cannot be revived as to part of the proceedings. — Thus a revivor cannot be made to operate from a particular period of the cause only, but the whole proceedings, bill, answer, and orders made in the cause, must stand revived ; for the revivor is but a continuance of the same suit, and it cannot be a continuation of the same unless it proceeds from where the other left off.⁵

It may be useful to the practitioner, before concluding this section, to direct his attention to some of the ordinary effects of abatement and revivor upon the proceedings in the cause.

Where the abatement is total, *i. e.*, where it is caused by the death, bankruptcy, insolvency or marriage of the plaintiff (being a

¹ For. Rom. 175.

² See ante, p. 148.

³ Ante, p. 148.

⁴ Lord Red. 80 ; *Ferrers v. Cherry*, 1 Eq. Ca. Ab. 3, 4.

⁵ For. Rom. 174. With respect to the form of a bill of revivor in the Courts of the United States, see Rule 47 of Equity Rules of the Supreme Court of the United States, January Term, 1842 ; Story Eq. Pl. § 374. Upon a bill of revivor, the sole questions before the Court are, the competency of the parties to revive, and the correctness of the frame of the bill to revive. *Bettes v. Dana*, 2 Sumner, 383. A bill of revivor, when necessary, may be filed of course, without an order of the Court granting permission to file it. *Pendleton v. Fay*, 3 Paige, 204.

female,) the cause is completely suspended, and cannot be proceeded in, till it has been revived, or the defect, caused by the abatement, cured ;¹ and, in general, all orders made pending such abatement, will be considered nugatory, and may be discharged. The same rule will also apply where the abatement has been caused by the death of one or more plaintiffs. Thus if, pending a total abatement, process of contempt is issued, it will be irregular, and may be discharged on motion with costs, and if a defendant is arrested on any process pending such abatement, he will be discharged from such arrest, with costs.² So, also, an order to dismiss a bill for want of prosecution, obtained pending an abatement, will be irregular.³

It is to be observed, however, that, although the general rule is as above stated, there are many cases in which the Court will entertain applications, although the suit is abated.⁴ Thus it will entertain a motion to discharge process of contempt issued or executed pending an abatement ; so also, although no regular order to dismiss a bill for want of prosecution can be obtained before revivor, the Court is now enabled, if the plaintiff's representatives omit to revive the suit within a reasonable period, to make an order that they shall revive within a limited time, or else that the bill shall be dismissed.⁵

It has, also, where the right to money in Court has been clear under former orders and reports, made an order upon petition for payment of the money out of Court to the party entitled, without regarding the abatement,⁶ or for the delivery of deeds and writings brought into Court, or it will direct an inquiry to whom they belong.⁷

An enrolment of a decree may also be made, and an order to do so, *nunc pro tunc*, may be made, notwithstanding an abatement.⁸

¹ See *Johnson v. Thomas*, 2 Paige, 377.

² *Wilson v. Metcalfe*, MSS.

³ *Sellars v. Dawson*, 2 Anst. 458.

⁴ Proceedings may be had in such ease to preserve the property in dispute ; *Washington Ins. Co. v. Slee*, 2 Paige, 358 ; or to set aside irregular proceedings in the Master's office ; *Quackenbush v. Leonard*, 10 Paige, 131 ; or to punish a party for a breach of an injunction. *Hawley v. Bennett*, 4 Paige, 163.

⁵ *Ante*, p. 811.

⁶ *Roundell v. Curren*, 6 Ves. 250 ; see also *Beard v. Earl Powis*, 2 Ves. 399 ; *Methodist Epis. Church v. Jaques*, 3 John. Ch. 1.

⁷ *Wharam v. Broughton*, 1 Ves. 185.

⁸ *Ante*, p. 1033.

Where, however, the suit abates after a decree has been pronounced, but before it is passed, there must be a revivor before it can be passed.¹

It is to be recollected that the Statute of Limitations will run pending an abatement in all cases, except a decree to account.²

For the effect of an abatement upon a sequestration to enforce an answer to a decree, the reader is referred to former parts of the present Treatise.³

It is to be observed, that an abatement, although it suspends proceedings in a cause, does not put an end to them; therefore, where process of contempt has been executed, and a defendant is in custody upon it, and afterwards the suit abates, the defendant is not thereby entitled to his discharge out of custody, but he must move that the plaintiff may revive within a limited time, or that the bill may be dismissed and he may be discharged. So also, an injunction is not absolutely dissolved by an abatement, but the defendant must, if he wishes to get rid of the injunction, move that the plaintiff may revive within a limited time, or that the injunction may be dissolved.⁴ With respect to motions of this description, Sir J. Wigram, V. C., observed,⁵ "That by the abatement of the suit all orders made in it would naturally drop. When, therefore, the Court (before it will permit an injunction to drop, on the ground of the suit being abated) gives the representatives of a deceased plaintiff notice that the injunction will be dissolved, unless the suit is revived within a limited time, it makes no order against the representatives, but, as matter of indulgence merely, gives them notice that the natural consequences of the abatement of the suit will ensue, unless they take measures to prevent it. And when the Court makes an order in the abated suit that the injunction be dissolved, it decides only that it will no longer prevent the natural consequences of the abatement of the suit."

¹ *Bertie v. Lord Falkland*, 1 Dick. 25.

² *Hollingshead's Case*, 1 P. Wms. 743.

³ *Ante*, p. 1077.

⁴ *Jones v. Massey*, *Brown v. Warner*, *Turner v. Cole*, all quoted in *Chowick v. Dimes*, 3 Beav. 292; *Leggett v. Dubois*, 2 Paige, 211; *Hawley v. Bennett*, 4 Paige, 163; *White v. Fitzhugh*, 1 Hen. & Munf. 1; *Kenner v. Hard*, *ib.* 204; *Collier v. Bank of Newbern*, 1 Dev. & Bat. Eq. 328. This will not apply to injunctions made perpetual by decree; see *Askew v. Townsend*, 2 Dick. 471, and *post*.

⁵ *Lee v. Lee*, 1 Hare, 622.

The same observations seem to apply to receivers appointed under an order of the Court, who are not usually discharged on abatement without an order of the like description.

Where an abatement is partial, *e. g.*, where it is caused by the death of a defendant, it prevents those proceedings only by which the interest of the deceased defendant may be affected; for the death of a defendant makes an abatement *quoad* himself alone; therefore, if there be a decree against trustees and their *cestui que trust* to convey, and the *cestui que trust* dies, the trustees may be compelled to convey, notwithstanding his death.¹ So also, pending an abatement by the death of a defendant, process of contempt may be issued and executed against the other defendants.

It has also been held, that the death of a defendant, after hearing but before judgment, does not necessarily prevent judgment;² but where, upon a motion to dismiss for want of prosecution, the plaintiff appears and undertakes to set the cause down for hearing within a limited time, in default of which the bill is to stand dismissed, and afterwards the defendant dies, and the time for setting the cause down expires before the suit can be revived, the order dismissing the bill is suspended during the abatement.³

We have already seen⁴ that where a bill against several defendants is retained, with liberty for the plaintiff to bring an action against one of them, the trial may take place during an abatement occasioned by the death of another defendant, provided such other is not directed by the decree to attend the trial, in which case a trial before the suit is revived against such defendant will be irregular.

Where the abatement of a suit is total, an order to revive places the suit and all the proceedings in it in precisely the "same plight, state, and condition that the same were in at the time when the abatement took place,"⁵ and the new plaintiff may take the same proceedings in the cause that the original plaintiff might have done; thus the plaintiff in a revived suit may amend the original bill, and issue an attachment against the defendant for not answer-

¹ *Finch v. Lord Winchelsea*, 1 Eq. Ca. Ab. 2.

² *Davies v. Davies*, 9 Ves. 461. Nor does it render a bill of revivor necessary prior to drawing up the decree; *Belsham v. Percival*, 8 Hare, 157.

³ *Gregson v. Oswald*, 1 Cox, 344.

⁴ *Ante*, p. 1120.

⁵ *Gregson v. Oswald*, 1 Cox, 343.

ing the amended bill.¹ So also, the new plaintiff may prosecute process of contempt against the defendant, taking it up where it left off at the abatement; and if a process has been issued before the abatement, it will be revived by the order to revive.²

The case is different where the abatement is occasioned by the death of a defendant; in such case, the process being personal, cannot be revived.³ In general, however, where an abatement is occasioned by the death of a defendant, the order to revive against the representatives of such defendant will place the suit as fully in the same position with regard to such representatives as can be done, with reference to the change of the individuals before the Court.

It will be necessary still to refer to a distinction which existed under the old practice, and which, though now nearly obsolete, will, in some cases, be necessary to an accurate comprehension of the existing practice.

A bill of revivor, properly so called, applied only in cases where a death intervened, and it was necessary to bring the proper representatives, whether real or personal, of the deceased party, before the Court; or where, by reason of the marriage of a female plaintiff, her rights were so modified that the suit could not be carried on by herself alone, but her husband became a necessary party.⁴ In each of these cases there was no other fact to be ascertained, than whether the new party brought before the Court had the character imputed to him. If he had, the revivor was of course: but there were many cases, in which there were other facts which might be brought into litigation, besides the mere question of the character of the new party; and to such cases, therefore, the simple bill of revivor did not technically apply. Under such circumstances, *an original bill in the nature of a bill of revivor* was the appropriate process to bring these facts before the Court, and to put the original proceeding again in motion, and enable the new party to have the benefit of the former proceedings.⁵

¹ Lord Red. 78; *Philips v. Darbie*, 1 Dick. 98.

² *Hyde v. Forster*, 1 Dick. 134.

³ A difference, as to practice, exists between sequestrations upon *mesne* process and sequestrations to enforce the performance of a decree or order, ante, p. 1077. In Massachusetts the executors of a deceased defendant to a bill in Equity may be brought in by a bill of revivor, although no service had ever been made on the testator. *Heard v. March*, 12 Cush. 580.

⁴ Ante, p. 107.

⁵ Lord Red. 70, 97; *Prac. Reg.* 90, 91; *Story Eq. Pl.* § 377, 378; *Brady v. McCosker*, 1 Comst. 214.

With respect to the cases where the plaintiff after filing a supplemental bill was entitled to the benefit of the former proceedings, reference must be had to the former practice, from whence it appears that there might be this difference between *an original bill in the nature of a bill of revivor* and an original bill in the nature of a supplemental bill: upon the first, the benefit of the former proceedings was absolutely obtained; so that the pleadings in the first cause, and the depositions of witnesses, if any had been taken, might be used in the same manner as if filed or taken in the second cause; and if any decree had been made in the first cause, the same decree shall be made in the second: but in the other case a new defence might be made; the pleadings and depositions could not be used in the same manner as if filed or taken in the same cause; and the decree, if any has been obtained, was no otherwise of advantage than as it might be an inducement to the Court to make a similar decree.¹

A bill in the nature of a bill of revivor could not be brought, except by some person who claimed in privity with the plaintiff in the original bill: ² thus, for example, if a bill was filed by a devisee under a will, and afterwards a subsequent will was proved, by which the same property was devised to another devisee; in such a case, the latter devisee could not, by a bill in the nature of a supplemental bill, avail himself of the proceedings in the original suit; for there was no privity between the plaintiff in the original suit, and the plaintiff in the supplemental bill; but if the bill had been filed by the devisor himself for some matter touching the estate devised, then the second devisee might file a supplemental bill in the nature of a bill of revivor, notwithstanding the first devisee has already filed such a bill; for he derives his title solely from the devisor, independently of the first devisee.³

¹ Lord Red. 72, and see ante, p. 1598.

² Story Eq. Pl. § 385. A devisee cannot maintain a bill of revivor, but he may maintain an original bill in the nature of a bill of revivor, and thus obtain the benefit of the original proceedings, as well before as after there has been a decree in the original suit. *Slack v. Walcott*, 3 Mason, 508, where this subject is very fully discussed.

³ *Oldham v. Eboral*, Coop. Sel. Ca. 27; *Rylands v. Latouche*, 2 Bligh, 585; *Tonkin v. Lethbridge*, Coop. Rep. 43. Where a bill in the nature of a bill of revivor is filed by any one, who was not a party to the original suit either as the representative of a deceased party or otherwise, all of the other parties to such original suit, who have any interest in the further proceedings therein, should be

The material distinction as to the right to the benefit of the former proceedings will remain under the existing practice, though the technical distinction as to the names of the different bills will probably not be regarded hereafter ; and in all the cases in which, under the former practice, an original bill in the nature of a bill of revivor might have been filed, the same benefit may now be obtained by a simple order to revive.¹

CHAPTER XXXIII.

BILLS OF REVIEW.

AFTER a decree has been made in a cause, a new original bill cannot be brought between the same parties, and for the same matters, unless the decree has been obtained by fraud.²

If a party seeks to reverse a decree which has been *signed and enrolled*, and upon error apparent, or on new facts, or facts discovered since publication passed in the original cause, he must file a made parties to such bill, either as plaintiffs or defendants. *The Farmers' Loan and Trust Co. v. Seymour*, 9 Paige, 538.

¹ Whenever a plaintiff has a right to revive a suit, he may add to the bill of revivor such supplemental matter as is proper to be added. *Pendleton v. Fay*, 3 Paige, 204 ; *Manchester v. Mathewson*, 2 Rhode Is. 416. A bill of revivor and supplement is merely a compound of these two species of bills. Such a bill not only continues a suit that has abated, but supplies any defects in the original bill arising from subsequent events. *Wescott v. Cady*, 5 John. Ch. 242. It must be framed and proceeded upon in the same manner as the two species of bills of which it is compounded. Lord Red. 80. And the same defences are applicable, that would be, if they were separate. *Lake v. Austwicle*, 4 Jurist, 314.

If matters contained in a bill of revivor and supplement are irrelevant or improper, the defendant may take advantage of the objection, either by plea, or by demurrer, or by exceptions for impertinence. *Pendleton v. Fay*, 3 Paige, 204. But the insertion of supplemental matter in a bill of this nature will not authorize the defendant to demur to the whole bill. He should demur to the supplemental matter only. *Randolph v. Dickerson*, 5 Paige, 517. See *Pendleton v. Fay*, 3 Paige, 204 ; *Eastman v. Batchelder*, 36 N. Hamp. 141.

² *Wortley v. Birkhead*, 3 Atk. 809 ; Mit. 84. A bill to impeach a decree for fraud is an original bill in the nature of a bill of review. *Ex parte Smith*, 34 Ala. 455 ; *Person v. Nevitt*, 32 Miss. (3 George) 180. Leave to file a bill of review may be granted upon petition, supported by evidence that the original decree was obtained by fraud. *Elliott v. Balcom*, 11 Gray, 286.

bill of review.¹ If the decree has *not* been signed and enrolled, and it is upon error apparent, he is at liberty to present a petition of rehearing. If the decree has not been signed and enrolled, and is sought to be reversed on new facts, or facts discovered since publication passed, the remedy is by a supplemental bill in the nature of a bill of review.² Each of these remedies will be considered in their order.

Chief Baron Gilbert, in his "Forum Romanum," compares a bill of review to an appeal from the prince pronouncing a definitive sentence of the civil and canon law uninformed, to the prince better informed.³

A devisee is not entitled to a bill of review of a decree against the testator, not being in privity with him; neither can an assignee in any case have a bill of review. Only parties or privies, as heirs, executors, or administrators, can ordinarily bring this bill.⁴

¹ Singleton v. Singleton, 8 B. Monroe, 340; Greenwich Bank v. Loomis, 2 Sand. Ch. 70; Thompson v. Goulding, 5 Allen, 81; Clapp v. Thaxter, 7 Gray, 384; Frazer v. Syper, 5 Sneed (Tenn.) 100; Simpson v. Downs, 5 Rich. Eq. (S. C.) 421; Elliott v. Balcom, 11 Gray, 286. This enrolment of the decree is essential to what is called by way of pre-eminence, a Bill of Review. See Cooper Eq. Pl. 91. In most of the State Courts of Equity in America, and certainly in the Courts of the United States, all decrees in Equity, as well as judgments at Law, are matters of record, and are deemed to be enrolled, as of the term of the Court at which they are passed, whether they are actually enrolled or not; so that in those Courts a bill of review is the ordinary and appropriate proceeding. Dexter v. Arnold, 5 Mason, 303, 310, 311; Whiting v. Bank of United States, 13 Peters, 6, 13; Goodhue v. Churchman, 1 Barb. Ch. 596; Greenwich Bank v. Loomis, 2 Sand. Ch. 70. A bill of review lies only to a final decree. Mackay v. Bell, 2 Munf. 523; Ellzey v. Lane, 2 Hen. & Munf. 589. An interlocutory decree, if erroneous, may be corrected by motion or petition to the Court. Banks v. Anderson, 2 Hen. & Munf. 20; Whiting v. Bank of United States, 13 Peters, 6, 14; Story Eq. Pl. § 634 a. And a bill in the nature of a bill of review lies only after a final decree, and not upon an interlocutory decree. Jenkins v. Eldredge, 3 Story C. C. 299. A bill of review is held not to accord with the system of Chancery Practice in Texas. Seguin v. Maverick, 24 Texas, 526. But a petition in the nature of a bill of review, to impeach a judgment for fraud, is maintainable. *ib.*

² See Wiser v. Blachly, 2 John. Ch. 489; Mead v. Arms, 3 Vermont, 148; 2 Harr. & John. 230; 4 J. J. Marsh. 500; Robinson v. Sampson, 26 Maine, 11, 13, 14; Baker v. Whiting, 1 Story C. C. 218, 233.

³ For. Rom. 183.

⁴ Wyatt P. R. 96; Gilb. For. Rom. 186; Webb v. Pell, 3 Paige, 368; Kennedy v. Bell, Litt. Sel. Ca. 125. And even persons having an interest in the

If a decree is made against a person who had no interest at all in the matter in dispute, or had not such an interest as was sufficient to render the decree against him binding upon some person claiming the same or a similar interest, relief may be obtained against error in the decree by a bill in the nature of a bill of review. Thus, if a decree is made against a tenant for life only, a remainderman in tail or in fee cannot defeat the proceedings against the tenant for life but by a bill, showing the error in the decree, the incompetency in the tenant for life to sustain the suit, and the accruer of his own interest, and thereupon praying that the proceedings in the original cause may be reviewed, and for that purpose that the other party may appear to, and answer this new bill, and that the rights of the parties may be properly ascertained. A bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, may be filed without the leave of the Court.¹

A party cannot bring a bill of review after a demurrer has been allowed to a former bill of review.²

If upon a bill of review a decree has been reversed, another bill of review may be brought upon the decree of reversal.³ After a bill of review has been dismissed, another bill brought by the same party, suggesting further error, was dismissed as irregular.⁴ After two trials, and a decree to establish the will, a bill of review cause, if not aggrieved by the particular errors assigned in the decree, cannot maintain a bill of review, however injuriously the decree may affect the rights of third persons. *Story Eq. Pl. § 409*; *Thomas v. Harvie*, 10 *Wheaton*, 146; *Whiting v. Bank of United States*, 13 *Peters*, 6. But with this exception, it may be generally stated, that all the parties to the original bill ought to join in a bill of review. *Bank of U. S. v. White*, 8 *Peters*, 252; *Dexter v. Arnold*, 5 *Mason*, 308; *Friley v. Hendricks*, 27 *Miss. (5 Cush.)* 412. Upon a bill filed to contest a will, the verdict of a jury taken therein will be binding on all persons interested in the will, although not parties to the suit; and such persons may come in by a bill in the nature of a bill of review, to review or reverse the decree. *Singleton v. Singleton*, 8 *B. Monroe*, 340.

¹ *Mitf. Pl. 83*; *Webb v. Pell*, 1 *Paige*, 564; *Edwardson v. Maseby*, 4 *J. J. Marsh.* 500; *Bleight v. Milroy*, 4 *Monroe*, 145. See *Creed v. Lancaster Bank*, 1 *Ohio (State)* 1.

² *Pitt v. Earl Arglass*, 1 *Vern.* 441; *Dunmy v. Filmore*, 1 *Vern.* 135; *Story Eq. Pl. § 418*.

³ *Mitf. Pl. 79*. See *Story Eq. Pl. § 418*; *Mitf. Eq. Pl. by Jeremy*, 88. But see *Stafford v. Byran*, 2 *Paige*, 45.

⁴ *Wyatt P. R.* 97.

was brought upon discovery of new matter; another trial was ordered, and a verdict being found for the heir-at-law, the former decree was reversed.¹

No objection can be taken to a bill of review, that the plaintiff has enrolled the decree; "because," says Lord Nottingham's MSS., "he can have no error till it be enrolled, and perhaps the defendant will never enrol it."² If a decree has been taken by consent, a bill of review will not lie against it, for *consensus tollit errorem*.³

In *Fitton v. Macclesfield*,⁴ it is said, there is no limitation of time for bringing a bill, but that after long acquiescence the Court will not reverse a decree, except upon very apparent errors; and the Court refused to reverse a decree made twenty-two years before the bill of review. It appears, however, that the limitation is twenty years; and that, after twenty years, a bill of review cannot be brought.⁵ The twenty years are computed from the date of the decree, and not from the time of the enrolment.⁶ Though a bill of review cannot in general be brought to reverse a decree

¹ *Attorney-General v. Turner*, Amb. 587.

² *Cook v. Bamfield*, 3 Swanst. 607.

³ *Webb v. Webb*, 3 Swanst. 658. See *Lansing v. Albany Ins. Co.* 1 Hopk. 102; ante, 1540, note, as to decrees by consent. A bill of review will not lie where the plaintiff himself has dismissed his bill. *Jones v. Zollicoffer*, 1 Car. Law. Repos. 376.

⁴ 1 Vern. 287.

⁵ In the Courts of the United States, bills of review for errors apparent on the face of decrees, are limited to five years, that being the limitation of writs of error upon judgments at law. *Thomas v. Harvie*, 10 Wheaton, 146; Story Eq. Pl. § 410. See *Noland v. Urmston*, 17 Ohio, 170; *Gullett v. Housh*, 7 Black. 52; *Mussie v. Graham*, 3 McLean, 41; *Boyd v. Vanderkemp*, 1 Barb. Ch. 273. It is not necessary to plead that the bill is not filed within the proper time. It ought to appear on the face of the bill that it is so, or that the plaintiff is within the saving of the statute. *Sheppard v. Lane*, 6 Munf. 529; Story Eq. Pl. 635, and note. See *Winchester v. Winchester*, 1 Head (Tenn.) 460; *United States v. Samperyac*, 1 Hemp. 118; *Coutee v. Pratt*, 9 Md. 67. See *Bucknor v. Forker*, 7 Dana, 51, where it was held that a bill of review will not be sustained for error of law, after a lapse of time which would bar a writ of error, unless the delay is sufficiently accounted for. *Mitchell v. Berry*, 1 Met. (Ky.) 602; *Creath v. Smith*, 20 Mis. (Bennet) 113. The question may arise whether a like limitation applies to bills of review upon newly discovered facts and evidence. See as to this, Story Eq. Pl. § 419; *Bencon v. Cutter*, 5 J. Marsh. 610.

⁶ *Deloraine v. Brown*, 3 Bro. C. C. 640, 621, (n); Mitf. Pl. 79; *Searisbrick v. Lord Skelmersdale*, 4 Younge & Coll. 79, 106.

after twenty years, yet that does not apply to persons having contingent interests, or not existing, or being under disabilities.¹

If the decree has been signed and enrolled, so that the cause cannot be reheard, and a party seeks to reverse the decree, the remedy, as before stated, is by bill of review.² So early as Lord Bacon's Ordinances it was provided that no decree should be reversed, altered, or explained, being once under the Great Seal, (which is being signed and enrolled) but upon bill of review.³

There are two grounds for a bill of review to reverse a decree. First, Error in law apparent on the face of the decree, without further examination of matters of fact. And, secondly, New facts, or facts discovered since the decree, or at least since publication passed in the original cause, and materially pressing upon the decree, and which could not possibly have been used at the time when the decree passed.⁴ In *Cooke v. Bamfield*,⁵ a third sort of bill of review is mentioned, viz., such as seeks to reverse a decree as being partly for the plaintiff, and partly against him, and so not large enough for him; it being the course of the Court to

¹ Wyatt P. R. 98; Kay v. Watson, 17 Ohio, 27.

² Taylor v. Sharp, 3 P. Wms. 371; Young v. Keighley, 16 Ves. 350; Wortley v. Birkhead, 3 Atk. 809.

³ Beam. Ord. 1.

⁴ Ib. 2; Young v. Keighley, 16 Ves. 350; Perry v. Phelps, 17 Ves. 178; Cooke v. Bamfield, 3 Swanst. 607; Norris v. Le Neve, 3 Atk. 34; Caller v. Shields, 2 Stew. & Port. 417; Love v. Blewit, 1 Dev. & Bat. Eq. 108, 110; Story Eq. Pl. § 404; Dexter v. Arnold, 5 Mason, 303; Triplett v. Wilson, 6 Call, 147; Kennedy v. Ball, Litt. Sel. Ca. 125; Quarrier v. Carter, 4 Hen. & Munf. 242; Wiser v. Blachly, 2 John. Ch. 488; Mead v. Arms, 3 Vermont, 148; Edwardson v. Maseby, 4 J. J. Marsh. 500; Brewer v. Bowman, 3 J. J. Marsh. 492; Hollingsworth v. McDonald, 2 Harr. & John. 230; Iler v. Routh, 3 How. (Miss.) 276; Bledsoe v. Carr, 10 Yerger, 55; Massie v. Graham, 3 McLean, 41; Gullet v. Housh, 7 Blackford, 52; United States v. Samperyae, 1 Hemp. 118; Foy v. Foy, 25 Miss. 207. These two causes for a bill of review may properly be joined in the same bill. Winchester v. Winchester, 1 Head (Tenn.) 460. To authorize a bill of review for new matter which has arisen "in time after the decree," it must be matter which was in existence at the time the decree was rendered, but was not known to the party till afterwards. Bledsoe v. Carr, 10 Yerger, 55; Winchester v. Winchester, *ubi supra*. Such a bill will lie on the discovery of additional record evidence. United States v. Samperyae, 1 Hemp. 118; Bush v. Madeira, 14 B. Monr. (Ky.) 212. In South Carolina, a bill of review does not lie for error in law apparent upon the face of the decree. Manigalt v. Deas, 1 Bailey Eq. 284.

⁵ 3 Swanst. 607.

allow a party to review a decree made for himself, if it be less beneficial to him than in truth it ought to have been.¹

The error assigned must be apparent on the body of the decree ; and it is no ground of review that the matters decreed are contrary to the proofs in the cause.² They must also be errors in matters of law, appearing on the body of the decree, or because

¹ See *Dexter v. Arnold*, 5 Mason, 303 ; *Ingalls v. Lord*, 1 Cowen, 240 ; *Hughes v. Stickney*, 13 Wendell, 280 ; *Parker v. Newland*, 1 Hill (N. Y.) 87.

² *Mellish v. Williams*, 1 Vern. 166. The bill cannot be sustained on the ground that the Court has decided wrong on a question of fact. *Webb v. Pell*, 3 Paige, 368. Nor can it be brought for wrong inferences of the Court on matters of evidence. *Young v. Henderson*, 4 Hayw. 189. Nor upon the ground that the former decree was not warranted by the evidence. *Dougherty v. Morgan*, 6 Monroe, 153 ; *Love v. Blewit*, 1 Dev. & Bat. Eq. 108, 110 ; *Eaton v. Dickinson*, 3 Sneed (Tenn.) 397 ; *Getzler v. Saroni*, 18 Ill. 511. Questions of fact are not open for discussion, on a bill of review for errors in law. *Evans v. Clement*, 14 Ill. 206. It will not lie where the original bill contains no equity ; *Todd v. Lackey*, 1 Litt. 271 ; but see *Griggs v. Gear*, 3 Gilman, 2 ; nor unless the plaintiff shows himself aggrieved by the decree ; *Lansing v. Albany Ins. Co.*, 1 Hopk. 102 ; nor after a demurrer has been allowed to a former bill of review. *Respass v. McClanahan*, Hardin, 342. The error must appear on the decree and pleadings ; for the evidence in the case at large cannot be examined to ascertain whether the Court misstated or misunderstood the fact. *Dexter v. Arnold*, 5 Mason, 303 ; *Story Eq. Pl. § 407* ; *P. & M. Bank v. Dundas*, 10 Alabama, 661. But taking the facts as they are stated to be on the face of the decree, it must be shown that the Court have erred in point of law. *Story Eq. Pl. § 407*. If, therefore, the decree does not contain a statement of the material facts on which the decree proceeds, it is plain that there can be no relief by a bill of review, but only by appeal to some superior tribunal. *Story Eq. Pl. § 407*. It is on this account that in England decrees are usually drawn up with a special statement of, or reference to, the material grounds of fact which support the decree. In the Courts of the United States, the decrees are usually general, without any statement of facts. See ante, 1020 *et seq.*, and notes ; *Burdine v. Shelton*, 10 Yerger, 41. But for the purpose of examining all errors of law, the bill, answer, and other proceedings are, in our practice, as much a part of the record before the Court as the decree itself ; for it is only by a comparison with the former, that the correctness of the latter can be ascertained. *Story Eq. Pl. § 407* ; *Dexter v. Arnold*, 5 Mason, 311, 312 ; *Hollingsworth v. McDonald*, 2 Harr. & John. 230 ; *Webb v. Pell*, 3 Paige, 368 ; *Whiting v. Bank of the U. States*, 13 Peters, 6, 13, 14 ; *Ludlow v. Kidd*, 2 Ohio, 372 ; *Stevens v. Hey*, 15 Ohio, 313 ; *Saum v. Stingley*, 3 Clark (Iowa) 514.

In *Sequin v. Maverick*, 24 Texas, 526, it is said that "as our decrees do not recite the facts, as under the English Chancery practice, upon a bill of review, the decree can at most be reversed, and not corrected to accord with the facts ; therefore a bill of review does not accord with our system."

the Court wanted or exceeded its jurisdiction.¹ Some Judges use the term, "appearing or arising on the body of the decree;" others, "apparent on the face of the decree;" both expressions must be understood in a circumscribed signification. Lord Eldon, in *Perry v. Phelps*,² observes, "There is a distinction between error in the decree, and error apparent; error apparent does not apply to a merely erroneous judgment." And again he says, "The question is not whether the cause is well decided, but whether the decree is right or wrong on the face of it;" and adds, "the cases of errors apparent are of this sort, — an infant not having a day to show cause."³

The bill of review is drawn, settled and signed, by counsel. In a bill of review it is necessary to state the former bill and the proceedings thereon,⁴ the decree,⁵ and the point in which the party exhibiting the bill of review conceives himself aggrieved by it; and the ground of law, or new matter discovered, upon which he seeks to impeach; and if the decree is impeached on the latter ground, it seems necessary to state in the bill the leave obtained to file it, and the fact of the discovery; though it may be doubted whether, after leave given to file the bill, that fact is traversable. The bill may pray, simply, that the decree may be reviewed, and reversed⁶ in the point complained of, if it has not been carried

¹ *Fitton v. Macclesfield*, 1 Vern. 292; *James v. Fisk*, 9 Smedes & Marsh. 144. A bill of review for error of law may be brought wherever the decree is contrary to the statute law: *Cooper Eq. Pl.* 89; *Wyatt's Prac. Reg.* 225. Error in matter of form only, though apparent on the face of a decree, seems not to have been considered a sufficient ground for reversing a decree. And matter of abatement has been also treated as not capable of being shown for error to reverse a decree. *Story Eq. Pl.* § 411; *Mit. Eq. Pl. by Jeremy*, 85. In case of mis-casting and miscounting, where the matter demonstratively appears from the decree itself to be mistaken, it may be explained and reconciled by order. *Seton on Decrees*, 399, and cases cited; *Massie v. Graham*, 3 McLean, 41.

² 17 Ves. 178.

³ The decree is to be treated as including the bill, answer, and other proceedings, excepting the evidence at large, and all these may be looked into to find errors "apparent on the face of the decree"; but substantial errors only will be noticed. *Saum v. Stingley*, 3 Clark (Iowa) 514; *Holman v. Riddle*, 8 Ohio (N. S.) 384. The fact that a decree is based upon inadmissible or improper evidence, is no ground for a bill of review, unless some error in law is apparent upon its face. *Eaton v. Dickinson*, 3 Sneed (Tenn.) 397.

⁴ *Turner v. Berry*, 3 Gilman, 541; *Randon v. Cartwright*, 3 Texas, 267.

⁵ *Groce v. Field*, 13 Geo. 24.

⁶ *Perry v. Phelps*, 17 Ves. 176.

into execution. If it has been carried into execution, the bill may also pray the farther decree of the Court to put the party complaining of the former decree into the situation in which he would have been if that decree had not been executed. If the bill is brought to review the reversal of a former decree it may pray that the original decree may stand.¹ The bill may also, if the original suit has become abated, be at the same time a bill of revivor. A supplemental bill may likewise be added, if any event has happened which requires it; and particularly if any person not a party to the original suit becomes interested in the subject, he must be made a party to the bill of review by way of supplement.² If an order has been obtained dispensing with the payment of costs ordered by the decree, it should be set out in the bill of review.³ The plaintiff cannot put his case in the alternative as a bill of review, or if the Court shall think it not so, then as a bill of revivor and supplement.⁴

The bill is filed by the plaintiff's clerk in Court in the usual manner, and the defendant is served with a subpœna and appears as to an original bill. A bill of review brought to reverse a decree for error apparent on the face thereof, may be filed without the leave of the Court.⁵ Before a bill of review can be filed it is

¹ Story Eq. Pl. § 420; *Dexter v. Arnold*, 5 Mason, 308, 309; Mitf. Eq. Pl. by Jeremy, 88 - 90.

² Mitf. Pl. 80; and see *Perry v. Phelps*, 17 Ves. 176; *Price v. Keyte*, 1 Vern. 135; Story Eq. Pl. § 420; Mitf. Eq. Pl. by Jeremy, 88 - 90; *Hodson v. Ball*, 11 Sim. 256, 463; *Singleton v. Singleton*, 8 B. Monroe, 340. A bill of review, defective in frame, may sometimes be sustained as a cross-bill. Welf. Pl. 239; *Cooper Eq. Pl. 95*; Mitf. Eq. Pl. by Jeremy, 89, 90.

³ *Wyatt P. R. 97*.

⁴ *Perry v. Phelps*, 17 Ves. 177.

⁵ *Anon. 2 P. W. 283*; *Perry v. Phelps*, 17 Ves. 178; *Gould v. Tancred*, 2 Atk. 534; *Denson v. Denson*, 33 Miss. (4 George) 560. By Rule 173, New York in Chancery, no bill of review could be filed, either upon the discovery of new matters, or otherwise, without special leave of the Court first obtained. The application for this purpose should be made by petition; which should state the nature of the suit, the decree, and the errors of law, or the new matters, as the case may be, upon which the application is founded, and should pray for liberty to file a bill of review, to bring such decree into review. If the application is founded upon the discovery of new matter, the petition must describe the new evidence distinctly and specifically, and state when it was discovered, and its bearing on the decree. *Dexter v. Arnold*, 5 Mason, 303; *Massie v. Graham*, 3 McLean, 41. It is not sufficient to state that the petitioner expects to prove certain facts. He must state the exact evidence to establish them. On the hearing

necessary that a deposit of 50*l.* should be made to answer costs.¹ The deposit is made with the senior registrar. By the 5th of Lord Bacon's Ordinances, it was provided that no bill of review should be put in except the party that preferred it entered into recognizances with sureties for satisfying costs and damages for the delay if it was found against him.² This provision being insufficient, by an Order of 12th March, 1700, it was ordered that for the future no bill of review should be allowed or admitted except the party who preferred it first deposited the sum of 50*l.* with the registrar of this Court, as a pledge to answer such costs and damages as this Court should award to the adverse party, in case the Court should think fit to dismiss the said bill of review.³ Filing the bill of review does not prevent the execution of the decree impeached.⁴

To entitle a person to bring a bill of review it is necessary that he should have obeyed and performed the decree;⁵ as, if it be for of such a petition, affidavits may be admitted on both sides, if necessary, to explain the nature of the evidence. *Dexter v. Arnold*, 5 Mason, 303, 308, 309; Story Eq. Pl. (3d ed.) 420, note; *Hollingsworth v. McDonald*, 2 Harr. & John. 230. Upon an application of this kind, the Chancellor exercises his judgment as to the propriety of interfering or meddling with the decree for the cause disclosed, and grants or refuses leave to file a bill of review accordingly. *Hollingsworth v. McDonald*, 2 Harr. & John. 230. The Court on permitting a bill of review, or a bill in the nature of a bill of review, to be filed, should, where there was no fraud in the first trial, impose such terms as to the use of testimony formerly delivered in the suit, but since become inaccessible to the parties, as under the circumstances may be equitable. *Singleton v. Singleton*, 8 B. Monroe, 340. The Court may refuse a review to the party applying, and grant it for the protection of the interests of others. *Hodges v. Milliken*, 1 Bland, 511. If a bill of review is filed without leave, in a case requiring it, it may be dismissed on motion. *Carroll v. Parran*, 1 Bland, 125.

¹ Anon. 2 P. W. 283.

² Beam. Ord. 4.

³ Beam. 313; *Webb v. Pell*, 1 Paige, 564.

⁴ *Williams v. Mellish*, 1 Vern. 117, n.

⁵ *Wiser v. Blachly*, 2 John. Ch. 488; *Livingston v. Hubbs*, 3 Ibid. 125; *Griggs v. Gear*, 3 Gilman, 2. Therefore, if the decree be for the payment of money, the party must pay it or give security, although it should afterwards be ordered to be refunded. *Lubé Eq. Pl.* 130. But the rule may be dispensed with under the circumstances of the case. Thus, where the party is in execution for non-payment of money under the decree, this is considered equivalent to performance. *Livingston v. Hubbs*, 3 John. Ch. 124. So where the party is insolvent; *Stalling v. Goodloe*, 3 Murph. 159; or has given security for the performance of the decree. *Stalling v. Goodloe*, 3 Murph. 159; *Taylor v. Pearson*, 2 Hawks, 298.

land, that the possession be yielded; if it be for money, that the money be paid; if it be for evidences, that the evidences be brought in; and so in other cases which stand upon the strength of the decree alone. But if any act be decreed to be done which extinguisheth the party's right at the common law, as making of assurance or release, acknowledging satisfaction, cancelling of bonds or evidences, and the like, those parts of the decree are to be spared until the bill of review be determined;¹ but such sparing is to be warranted by public order made in Court.²

If the decree directs an act to be done by the defendant after the plaintiff has done a certain other act, and the plaintiff has not performed his part, it is no objection to the defendant's filing a bill of review that he has not obeyed the decree. In *Partridge v. Usborne*,³ the decree directed the defendant to pay a certain sum upon the execution of the conveyance. The defendant filed a bill of review, which the plaintiff moved to take off the file on the ground that the defendant had not performed the decree. The Lord Chancellor refused the motion, the defendant not being bound to pay the money until the conveyance was executed. He intimated, however, that when that was done, if the decree was not obeyed, a motion should be made to stay the proceedings in the bill of review till the decree had been performed.

If the party is unable to perform the decree, he must move for an order to stay what is proper to be stayed,⁴ and should swear to his inability, and if he is in contempt he should surrender himself to the Fleet, to lie there till the matter on the bill of review is determined.⁵ If costs have been decreed in the original cause, they should be paid before the bill of review is filed. In *Fitton v. Macclesfield*,⁶ a plaintiff was allowed to bring a bill of review without paying the costs decreed in the original cause, upon making oath that he was not worth 40*l.* besides the matter in question.

In *Partridge v. Usborne*,⁷ a motion was made on behalf of the defendant, that he might be at liberty, under an Order of the 8th August, to file a supplemental bill, in the nature of a bill of re-

¹ *Massie v. Graham*, 3 McLean, 41; *Griggs v. Gear*, 3 Gilman, 2.

² Beam. Ord. 4.

³ 5 Russ. 251.

⁴ Wyatt, P. R. 97.

⁵ *Williams v. Mellish*, 1 Vern. 117, n.

⁶ 1 Vern. 287.

⁷ 5 Russ. 232.

view, without previously performing an order made in the original cause on the 22d of January, and that all proceedings under the last mentioned order might be stayed, he undertaking to file such bill within one month, and offering to pay into the bank, to the credit of the cause, such sum as the Court might think fit to order. On the 16th of September, before judgment was given on the motion, the defendant filed a supplemental bill in the nature of a bill of review. On the 28th of October, a motion was made on behalf of the plaintiff, that the supplemental bill might be taken off the file. It was supported by an affidavit, which set forth the proceedings, and stated "that the defendant had not performed the decree." The Lord Chancellor, after reviewing several cases referred to in his judgment, decided that it was only under very particular and special circumstances that the rule requiring the decree to be performed in the original suit could be dispensed with, and that the large amount of the sum to be paid in this case would not justify the Court in interposing for the purpose of dispensing with this order, and refused the motion, with costs.

The appearance of the defendant to a bill of review is enforced in the same manner as to an original bill.¹ The usual defence to this description of bill is by a demurrer. The defendant may plead the decree, and demur against opening the enrolment to a bill of review brought for errors apparent; and in the plea and demurrer the Court will judge whether there are grounds for opening the enrolment. Mitford says, there seems, however, no necessity for pleading the decree, because it must be stated in the bill, and that the books of practice contain the forms of a demurrer only to such a bill.² Where any matter beyond the decree is to be offered against opening the enrolment, as length of time, that matter must be pleaded; otherwise the plaintiff will not have the benefit of exceptions, as infancy, coverture, or the like.³

If a demurrer be put in to a bill to reverse a decree on error

¹ It is said that a bill of review does not constitute a part of the original cause, but is an independent proceeding, in *Cole v. Miller*, 32 Miss. (3 George) 89.

² Mitf. Pl. 166. See *Webb v. Pell*, 3 Paige, 368; Mitf. Eq. Pl. by Jeremy, 203, 204. For the form of a demurrer to a bill of review, see Willis, 483; 2 Equity Drafts, 92, (2d ed.)

³ See Mitf. Eq. Pl. by Jeremy, 291. It would be a good plea to a bill of review, that the decree in the original cause was entered by consent. But such defence must be pleaded or insisted on in the answer. *Turner v. Berry*, 3 Gilman, 541. See *Jenkins v. Eldredge*, 3 Story C. C. 299.

apparent, and the demurrer is overruled, the decree is reversed and the errors allowed, and no further answer or hearing is necessary.¹ If the demurrer is allowed, it has all the effect of confirming the decree, and terminates the suit.

The rule upon a strict and proper bill of review is, that the decree can be varied only upon such errors as are complained of, whether errors on the face, or errors of injustice, unless any consequential matter arises; for if there is a consequential direction, the justice of which depends entirely upon the variation made, the Court may vary a decree as to that consequential direction in favor of justice; and that is the practice in the House of Lords, who will vary a decree in favor of the respondent in any matter consequential to the relief they give to the appellant.²

If a bill of review be brought to reverse a decree upon new facts, or facts newly discovered, as upon a deed discovered by the plaintiff since the former decree: or where the plaintiff swore that he did not know that certain securities were joint property;³ or upon a release or a receipt discovered since publication;⁴ leave must be obtained of the Court to file such bill.⁵

In *Willan v. Willan*,⁶ Lord Eldon, on a petition for liberty to review on new evidence, although the point was not decided, ap-

¹ *Cooke v. Bamfield*, 3 Swanst. 607; Lord Nottingham's MSS. After a defendant has demurred to a bill of review he cannot object to the right to file it. *Griggs v. Gear*, 3 Gilman, 2.

² *Moore v. Moore*, 2 Ves. 598.

³ *Young v. Keighly*, 16 Ves. 350.

⁴ *Taylor v. Sharpe*, 3 P. W. 371.

⁵ *Anon.* 2 P. W. 283; *Perry v. Phelps*, 17 Ves. 178; *Gould v. Tancred*, 2 Atk. 534; *Beam. Ord.* 3. See ante, 1633; *Webb v. Pell*, 1 Paige, 564; *Edwardson v. Maseby*, 4 J. J. Marsh. 500; *Wilkinson v. Parish*, 3 Paige, 653; *Story Eq. Pl.* § 412; *Love v. Blewit*, 1 Dev. & Bat. Eq. 108, 110; *Simpson v. Watts*, 6 Rich. Eq. (S. C.) 364; *Pfeltz v. Pfeltz*, 1 Md. Ch. Dec. 455; *Elliott v. Balcom*, 11 Gray, 286. The granting of such a bill of review for newly discovered evidence is not a matter of right, but it rests in the sound discretion of the Court. It may therefore be refused, although the facts, if admitted, would change the decree, where the Court, looking to all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause unadvisable. *Story Eq. Pl.* § 417; *Dexter v. Arnold*, 5 Mason, 315; *Thomas v. Harvie*, 10 Wheat. 146; *Wood v. Mann*, 2 Sumner, 316; *Hollingsworth v. McDonald*, 2 Harr. & John. 230; *Jenkins v. Eldredge*, 3 Story C. C. 299, 323, 324; *Massie v. Graham*, 3 McLean, 41; *P. & M. Bank v. Dundas*, 10 Alabama, 661; *Winchester v. Winchester*, 1 Head (Tenn.) 460; *Hughes v. Jones*, 2 Md. Ch. Dec. 289.

⁶ 16 Ves. 87.

peared doubtful as to the propriety of a bill of review pending an appeal to the House of Lords against a decree of the Lord Chancellor, affirmed by him on a rehearing. Mitford says a bill of review upon new matter discovered has been permitted, even after an affirmance of the decree in Parliament; but adds, that it may be doubted whether a bill of review upon error in the decree itself can be brought after affirmance in Parliament.¹

The application is made by an attendable petition, praying for liberty to file a bill of review. The petition is supported by an affidavit showing the party's rights; that the matter was not known to him at the time of the decree, or was discovered since such other time, that he could not have used it to his advantage in the former cause.²

The new matter, upon which such a bill is necessary, must have come materially and substantially to the knowledge of the party, or his agents, after the decree, or at least after the time when it could have been advantageously introduced in the former cause,³ and the new matter not only must not have come to the knowledge of the party, but it must be shown that the party could not with reasonable diligence have acquired a knowledge of it before the time when publication passed.⁴ Lord Eldon said the question always

¹ Mitf. Pl. 79; Mitf. Eq. Pl. by Jeremy, 88; Cooper Eq. Pl. 91; Story Eq. Pl. § 418. But see *Stafford v. Bryan*, 2 Paige, 45; *Campbell v. Price*, 3 Munf. 227; *Singleton v. Singleton*, 8 B. Monroe, 340.

² *Wortley v. Birkhead*, 2 Ves. 571. See ante, 1633.

³ *Ord v. Noel*, 6 Madd. 127; *Willan v. Willan*, 16 Ves. 87; *Earl of Portsmouth v. Lord Effingham*, 1 Ves. 434; *Norris v. Le Neve*, 3 Atk. 34; Story Eq. Pl. § 413; *Dexter v. Arnold*, 5 Mason, 303; *Haskell v. Raoul*, 1 M'Cord Ch. 29; *Hollingsworth v. McDonald*, 2 Harr. & John. 230; *McCracken v. Finley*, 1 Bibb, 455; *Harvey v. Murrell*, Harper Eq. 257; *Lansing v. Albany Ins. Co.* 1 Hopk. 102; *Dias v. Merle*, 4 Paige, 259; *McCall v. Graham*, 1 Hen. & Munf. 13; *Pendleton v. Fay*, 3 Paige, 204; *Greenlee v. McDowell*, 4 Ired. Eq. 481; *Stevens v. Dewey*, 1 Williams (Vt.) 633. It must at least have been discovered since publication. *Livingston v. Hubbs*, 3 John. Ch. 124; *McCracken v. Finley*, 1 Bibb, 455; 4 Hayw. 36; 2 Munf. 305; *Dexter v. Arnold*, 5 Mason, 312; *Wiser v. Blachly*, 2 John. Ch. 488; Story Eq. Pl. § 413; *Hodges v. Milliken*, 1 Bland, 511. It is now the established exposition of Lord Bacon's Ordinance on this point, that the new matter shall not have been discovered until after publication has passed. Story Eq. Pl. § 413; *Love v. Blewit*, 1 Dev. & Bat. Eq. 108, 110; *Callar v. Shields*, 2 Stew. & Port. 417. The Ordinance of Lord Bacon still governs bills of review. *Massie v. Graham*, 3 McLean, 41. See *Clapp v. Thaxter*, 7 Gray, 384, 386, 387.

⁴ *Young v. Keighly*, 16 Ves. 350; Story Eq. Pl. § 414; *Dexter v. Arnold*, 5 Mason, 312, 320, 321; *Livingston v. Hubbs*, 3 John. Ch. 124; *Pendleton v. Fay*,

is, not what the plaintiff knew, but what, using reasonable diligence, he might have known.¹ The matter must not only be new, but material, and such as if unanswered in point of fact would clearly entitle the plaintiff to a decree, or would raise a question of so much nicety and difficulty, as to be a fit subject of judgment in the cause.² And it is said that the matter if known to the other party must be of such a nature that he was not in conscience obliged to have discovered it to the Court, for if the matter was known to the other party, and such as in conscience he ought to have discovered, he obtains decree by fraud, and it ought to be set aside by original bill.³ The party must show that the new matter is relevant (or that there is probable cause that it may be relevant) to the matters in question.⁴

In *Willan v. Willan*,⁵ the cause was heard before the Lord Chancellor, and the decree affirmed on rehearing; the defendant appealed to the House of Lords, and pending the appeal, he presented a petition for liberty to file a bill of review. The object was to introduce new evidence in opposition to that of a witness in the original cause, who had given evidence as to a conversation; the ground was, that the evidence was admitted by surprise, not being in answer to an interrogatory, and not the subject directly in issue. The Lord Chancellor did not think the case made out, or that the new evidence could be received; and said the decree was not founded on the evidence complained of; the petition was refused with costs.⁶

3 Paige, 204; *Wiser v. Blachly*, 2 John. Ch. 488; *Barrow v. Rhinelander*, 3 John. Ch. 120; *Lansing v. Albany Ins. Co.* 1 Hopk. 102; *Love v. Blewit*, 1 Dev. & Bat. Eq. 108, 110; *Massie v. Graham*, 3 McLean, 41; *Jenkins v. Prewit*, 7 Blackford, 329; *Stevens v. Hey*, 15 Ohio, 313; *Jenkins v. Eldredge*, 3 Story C. C. 299, 314, 315; *Respass v. McClanahan*, Hardin, 342; *Hamersley v. Lambert*, 2 John. Ch. 124, 125; *Wood v. Mann*, 2 Sumner, 316.

¹ *Young v. Keighly*, 16 Ves. 353.

² *Ord v. Noel*, 6 Madd. 127; Story Eq. Pl. § 413; *Blake v. Foster*, 2 Moseley, 257; *Wiser v. Blachly*, 2 John. Ch. 488; *Livingston v. Hubbs*, 3 John. Ch. 124; *Kennedy v. Ball*, 6 Litt. 125; *Jenkins v. Eldredge*, 3 Story C. C. 299; *Mitchell v. Berry*, 1 Met. (Ky.) 602.

³ *Manaton v. Molesworth*, 1 Eden, 25.

⁴ *Bennett v. Lee*, 2 Atk. 528; *Norris v. Le Neve*, 3 Atk. 34; *Earl of Portsmouth v. Lord Effingham*, 1 Ves. 434.

⁵ 16 Ves. 87.

⁶ Newly-discovered evidence, which merely goes to impeach the testimony of witnesses, is not sufficient. *Livingston v. Hubbs*, 3 John. Ch. 124.

With regard to allowing bills of review to be filed upon facts newly discovered, Lord Eldon said, the decisions appear to have been upon new evidence, which, if produced in time, would have supported the original case, and are not applicable where the original cause does not admit the introduction of the evidence as not being put in issue originally, especially where enough appears upon the original pleadings to call upon the plaintiff, using reasonable diligence, to bring forward the whole case.¹ And a petition for liberty to review was refused, although Lord Eldon thought upon substance the petition might have succeeded.

In *Patterson v. Slaughter*,² Lord Hardwicke says: — “All the bills of review that I recollect to have known were of new matter to prove what was put in issue. Lord Effingham’s case was so; he claimed under an old entail; and though he afterwards made title under a different entail, yet the issue was as claiming under some old entail generally. In the present case it is not new matter to prove what was put in issue, but to prove a title that was not in issue, and therefore the defendant would not be entitled to a bill of review.”³ Chief Baron Gilbert, in his *Forum Romanum*, says, “They can examine to nothing that was in issue in the original cause, unless it be any matter happening subsequent, which was not before in issue, or upon matter of record, or writing not known before; for if the Court should give them leave to enter into proofs upon the same points that were in issue, that would be under mischief, as the examination of witnesses after the same publication, and an inlet into manifest perjury.”⁴

The point underwent a careful examination in a recent case, of *Partridge v. Usborne*.⁵ A bill was filed in this suit, for the specific performance of an agreement to purchase: a reference of title was directed: a good title found: and a specific performance decreed. After this it was discovered that there had been gross misrepresentation as to the timber, which formed a prominent part of the purchase; and, on that ground, an application was made for liberty to file a bill of review. To this petition it was objected, that the point as to the timber not being raised by the answer, and not

¹ *Young v. Keighly*, 16 Ves. 354.

² Amb. 293.

³ *Partridge v. Usborne*, 5 Russ. 228.

⁴ Gilb. For. Rom. 186.

⁵ 5 Russ. 195.

being in issue in the cause, the application could not be granted. In answer to this objection, a case of *Barnes v. Offer*,¹ decided by the Master of the Rolls, 20th December, 1825, was cited, showing that a point not in issue formed the ground for granting liberty to file a supplemental bill, in the nature of a bill of review. The Lord Chancellor said: "As to the question whether the matter brought forward by this petition, not having been put in issue in the original cause, it is now competent for the petitioner to ask for the benefit of it, by means of a supplemental bill in the nature of a bill of review, I am satisfied, by the discussion which has taken place, that, in a suit of this description, a party may apply for such relief as this petition prays."² The order made by his Lordship was, that the petitioner, upon depositing 50*l.* with the registrar, should be at liberty to file a supplemental bill in the nature of a bill of review, upon the new matter stated in his petition touching the warranty and otherwise, and for relief, as he should be advised; and that he should be at liberty to apply to have the original cause set down to be reheard, and to come on at the same time.

If the matter had come to the knowledge of the plaintiff's attorney, before the time had expired within which such evidence could have been used in the original cause, it is notice to the party himself,³ and will not form a ground for a review.⁴

In a case where a party, after decree, came to the knowledge of two letters, which seemed to overthrow the decree and all the pro-

¹ *Partridge v. Usborne*, 5 Russ. 225, n.

² Story Eq. Pl. § 415, 416, and notes; Mitf. Eq. Pl. by Jeremy, 85-87; *Dexter v. Arnold*, 5 Mason, 313. It seems now to be established, that matter discovered after a decree has been made, though not capable of being used as evidence of anything which was previously in issue in the cause, but constituting an entirely new issue, may be the subject of a bill of review, or of a supplemental bill in the nature of a bill of review. Welf. Eq. Pl. 238; Story Eq. Pl. § 416. In *Love v. Blewit*, 1 Dev. & Bat. Eq. 108, 110, it was held, that if the newly-discovered evidence is in writing or of record, a review will be granted, notwithstanding the fact to which such evidence relates may have been in issue before; but otherwise, if the newly-discovered evidence is merely parol proof. *Head v. Head*, 3 A. K. Marsh. 121. See Story Eq. Pl. § 415, and note, § 416; *Randolph v. Randolph*, 1 Hen. & Munf. 180; *Jenkins v. Eldredge*, 3 Story C. C. 299, 312; *Respass v. McClanahan*, Hardin, 346; *Vaughn v. Hann*, 6 B. Monroe, 338; *United States v. Samperyac*, 1 Hemp. 118; *Bush v. Madeira*, 14 B. Monr. (Ky.) 212.

³ *Norris v. Le Neve*, 3 Atk. 35.

⁴ See *Jenkins v. Eldredge*, 3 Story C. C. 299.

ceedings dependent thereon, the Court below would not put the party to answer to those two letters, but allowed a demurrer to a bill of review. The reason given in that case was, that the party might have found out the two letters before the hearing, since he had them in his own custody; and that if this practice should take place, it might overthrow all the decrees in the Court; and that, if this should be allowed as a precedent, a man might take up his defence when he pleased; whereas his whole defence ought to be made at once, and before the hearing. Gilbert adds: "It is said the Lords reversed the allowance of the demurrer, and ordered the party to answer to the bill of review: but this precedent may be found out whenever there is occasion for it." He continues; "Certainly the reversal in the House of Lords was right; for the letters relating to the partnership were found after the decree, which the party had no knowledge of, though they happened to be in his custody; they ought to be taken under consideration, even after a decree signed and enrolled: but then the party in whose custody the papers were, must give an account of their manner of coming to light; and in this case these letters were sent in trunks from Hamburgh, where he had no reason to suspect there were any papers relating to the cause; so the finding of them was as much casual after the decree, as if they had not been in the party's custody, and any matter casually coming to light after a decree that would make an alteration in the decree, ought to be taken into consideration upon a bill of review; and, therefore, they reversed that part of the decree which established the demurrer to the bill of review, without compelling the defendant to such bill of review to answer to the letters."¹

In *Gould v. Tancred*,² the petition for leave to review was 1st, because the Master in his report had not made annual rests; 2dly, had omitted three years in the account; and 3dly, that there was matter come to the plaintiff's knowledge subsequent to the Master's making his report, though it existed at that time. Lord Hardwicke thought the application unfortunate, the report having been confirmed six years, and refused the petition, as it would appear, on the two first points, because the petitioner's solicitor attended on the accounts before the Master, which bound the party. On the third point the application was refused, as not supported by the evidence.

¹ For. Rom. 187.

² 2 Atk. 553.

If the plaintiff, by his petition and the evidence in support, makes out a sufficiently *prima facie* case, an order will be made upon the petitioner's depositing 50*l.* with the registrar, that he may be at liberty to file a bill of review, as he shall be advised. The bill is settled and signed by counsel, and filed with the plaintiff's clerk in Court. The defendant is served with a subpoena, appears, and may plead, answer, or demur, as in an original bill.¹

A bill of review upon the discovery of new matter, and a supplemental bill of the same nature being exhibited only by leave of the Court the ground of the bill is generally well considered before it is brought; and, therefore, in point of substance, it can rarely be liable to a demurrer. But if brought upon new matter, and the defendant should think the matter not relevant, probably he might take advantage of it by way of demurrer, although the relevancy ought to be considered at the time leave is given to bring the bill.²

If a demurrer be put in to a bill of review, on the ground of new facts, or facts newly discovered, and the demurrer is overruled, it does not dispose of the cause, and the defendant must answer, because fact is at issue.³ On arguing a demurrer to a bill of review, nothing can be read but what appears on the face of the decree; but after the demurrer is overruled, the plaintiffs are at liberty to read bill or answer, or any other evidence, as at a rehearing, the cause being now equally open.⁴ If the demurrer is allowed

¹ A trial by jury upon a bill of review is within the discretion of the Judge who hears the cause. *Elliott v. Balcom*, 11 Gray, 286.

The finding of facts by the Court on a petition for leave to file a bill of review in Equity is not conclusive at the hearing on the bill. *Elliott v. Balcom*, 11 Gray, 286.

² Mitf. Pl. 167; 1 Story, Eq. Pl. § 636; Mitf. Eq. Pl. by Jeremy, 205; Cooper, Eq. Pl. 216.

³ *Cooke v. Bampffield*, 3 Swanst. 607, Lord Nottingham's MSS. Upon a bill of review for newly-discovered evidence, the other party may controvert the fact that it is newly discovered, by plea or answer. *Dexter v. Arnold*, 5 Mason, 303. See *Hughes v. Milliken*, 1 Bland, 506.

⁴ *Catterall v. Purchase*, 1 Atk. 290; Lubé, Eq. Pl. 248. If the bill has assigned errors of law, and the plea and demurrer be allowed, an order to that effect is made, and that the bill be dismissed. *Webb v. Pell*, 3 Paige, 368. If a bill of review be brought on new matter, fitting to be answered, the defendant may put in an answer controverting the fact that the matter is newly discovered. Lubé, Eq. Pl. 132; *Dexter v. Arnold*, 5 Mason, 303. The case will proceed upon such bill as an original bill. 2 Hoff. Ch. Pr. 12.

there is an end of the suit, as no new bill of review can be filed after a demurrer has been allowed to a former bill of review. If the demurrer is allowed, it may be enrolled, but it is said to be otherwise if the demurrer is disallowed.¹

If the decree has not been signed and enrolled, and the error is apparent on the face of the decree, the remedy is by a rehearing. There is no instance of a bill *in the nature of a bill* of review, upon error apparent.² If the decree has been enrolled, as before stated, it is a bill of review.

If the objection is upon matter of law, apparent, or a mistake in law, to be collected from all the pleadings and evidence, and the decree has not been signed and enrolled, it is the subject of a rehearing, and there is no occasion for a bill, in the nature of a bill of review.³

If new facts have been discovered since publication passed in the original cause, then a supplemental bill is necessary to introduce those facts.⁴ Before this supplemental bill can be filed, the leave of the Court must be obtained in the manner before explained.

When the decree has not been signed and enrolled, a bill of review cannot be brought.⁵

If the decree has not been signed and enrolled, and the supposed error appears from new matter which has arisen since the decree, or upon new proof materially pressing upon the decree, and discovered after the decree, or at least after publication had passed in the cause, the remedy is by a supplemental bill in the nature of a bill of review.⁶ In this case, leave must be obtained for liberty to file a supplemental bill in the nature of a bill of review, by an attendable petition, supported by affidavit, similar to

¹ Woots v. Tucker, 2 Vern. 119, *sed query?*

² Perry v. Phelips, 17 Ves. 178.

³ Ibid.; Story Eq. Pl. § 421, and note; Pendleton v. Fay, 3 Paige, 204; Wiser v. Blachly, 2 John. Ch. 488; Mitf. Eq. Pl. by Jeremy, 90.

⁴ Perry v. Phelips, 17 Ves. 178.

⁵ Llewellyn v. Mackworth, 2 Atk. 40; Standish v. Radley, 2 Atk. 178.

⁶ Young v. Keighly, 16 Ves. 350; Wortley v. Birkhead, 3 Atk. 809; Story Eq. Pl. § 422; Pendleton v. Fay, 3 Paige, 204; Mitf. Eq. Pl. by Jeremy, 91; Singleton v. Singleton, 8 B. Monroe, 340; Dausman v. Hooe, 3 Wis. 466. A petition asking leave to file a supplemental bill in the nature of a bill of review, may be filed at any time before the decree is enrolled. Ridgeway v. Toram, 2 Md. Ch. Dec. 303. The application addresses itself to the sound discretion of the Court, and does not rest upon a foundation of strict right. Hughes v. Jones, 2 Md. Ch. Dec. 289; Winchester v. Winchester, 1 Head (Tenn.) 460.

that used for liberty to file a bill to review a decree signed and enrolled, on new facts or new evidence discovered.¹

There is this difference between a bill of review and a supplemental bill in the nature of a bill of review. In the former, if introducing also matter of supplement or revivor, the prayer, as far as it is a bill of review, is that the decree may be *reviewed* and *reversed*; in the other, adopting also the proper prayer for revivor, as to the supplemental matter, the prayer is that the cause may be reheard.²

If the Court is of opinion that the new matter is material and relevant, and of such a nature as to make it a fit subject of judgment in a cause, and the evidence satisfactorily makes out that the new matter did not come to the knowledge of the plaintiff or his agents within such time as the same could have been advantageously used in the original cause, liberty will be given to the petitioner to file a supplemental bill in the nature of a bill of review.

The order is, that upon the petitioner's depositing 50*l.* with the registrar, he may be at liberty to file a supplemental bill, in the nature of a bill of review, as he shall be advised. The deposit of 50*l.* is required, by Order of 17th October, 1741.³ Before this order, although a bill of review could not be brought upon a decree signed and enrolled, for new and supplemental matter in being at the time of making the decree, but discovered and come to knowledge afterwards, without the leave of the Court, and making a deposit of 50*l.*; yet if the decree had not been signed and enrolled, a practice appears to have existed of filing a supplemental bill in the nature of a bill of review at large, without making any

¹ Story Eq. Pl. § 422; *Pendleton v. Fay*, 3 Paige, 204; *Mitford Eq. Pl.* by Jeremy, 91; *Hughes v. Jones*, 2 Md. Ch. Dec. 289; *Simpson v. Watts*, 6 Rich. Eq. (S. C.) 364. It seems to be a general rule, that a supplemental bill for newly-discovered matter should be filed as soon after the new matter is discovered as it reasonably may be. Story Eq. Pl. § 423. If, therefore, a party proceeds to a decree after the discovery of the facts upon which the new claim is founded, he will not be permitted afterwards to file a supplemental bill in the nature of a bill of review founded on those facts; for it was his own laches not to have brought them forward at an earlier stage of the cause. *Pendleton v. Fay*, 3 Paige, 204; *Dias v. Merle*, 4 Paige, 259; Story Eq. Pl. § 423; *Gullett v. Housh*, 7 Blackf. 52; *Ridgeway v. Toram*, 2 Md. Ch. Dec. 303; *Hughes v. Jones*, *ubi supra*.

² See Story Eq. Pl. § 425.

³ Beam. Ord. 368.

deposit, and without obtaining the leave of the Court at all; and the party then brought a petition to rehear or repeal. This, says Lord Hardwicke, in the cases cited, was growing into abuse, and several supplemental bills were brought for vexation. To put these improper bills of review under the like restraint as the other bills of review, the Order of 1741 was made.¹

This order provides, "That no supplemental bill, or bill in the nature of a bill of review, grounded upon new matter discovered, or pretended to be discovered, since the pronouncing of any decree of this Court, in order to the reversing or varying of such decree, shall be exhibited without the special leave of the Court first obtained for that purpose. And unless the party exhibiting the same do first deposit with the registrar of this Court so much money, as together with the deposit by the rules of this Court to be made on obtaining a rehearing of the cause or causes wherein such decree was pronounced, will make up the sum of 50*l.*, as a pledge to answer such costs and damages as shall be awarded to the adverse party, in case the Court shall think fit to award any at the hearing of the cause on such supplemental or new bill."²

The deposit of 50*l.* being made, and the order for liberty to file the supplemental bill, in the nature of a bill of review, being drawn up, the same is then filed. The bill states the new facts, and prays that the cause may be reheard. This suit is proceeded with in the same manner as a bill of review on new matter, and may be met by the same defences. Mitford says, "Bills in the nature of bills of review do not appear subject to any peculiar cause of demurrer, unless the decree sought to be reversed does not affect the interest of the person filing the bill."³

There is this difference, that in a supplemental bill in the nature of a bill of review, the Court will not, as on a bill of review, entertain the question, or vary it, or reverse the decree on the hearing of that bill, but will require that a petition of appeal or rehearing should be presented, to come on and be heard with such supplemental bill. This was decided by Lord Hardwicke in *Moore v. Moore*,⁴ when a supplemental bill, in the nature of a bill of review, came on to be heard without a petition of appeal or rehearing, but liberty was given to prefer such petition. So in *Perry v.*

¹ *Moore v. Moore*, 2 Ves. 598.

² Beames's Ord. 368.

³ Mitf. Pl. 167.

⁴ 2 Ves. 598.

Phelips,¹ Lord Eldon said, "if a decree, not signed and enrolled, is sought to be reversed upon error apparent, and a petition of rehearing has been presented, and also a supplemental bill is filed, to introduce new facts discovered since publication, the cause will come on to be heard upon the matter of that supplemental bill, together with a rehearing of the original cause, and the Court will vary the decree upon the rehearing, taking into consideration the new or lately discovered facts."

In *Moore v. Moore*,² the cause came before the Court upon a new bill, partly supplemental, in the nature of a bill of review, with new matter said to be existing at the time of the former decree, and discovered since, and partly original as against one party, and on a petition of appeal from a decree made by the Master of the Rolls.

CHAPTER XXXIV.

CROSS-BILL.

As a defendant cannot pray anything in his answer, except to be dismissed the Court, if he has any relief to pray, or discovery to seek, he must do so by a bill of his own, which is called a cross-bill.³

A cross-bill is a bill brought by a defendant against a plaintiff, or other parties in a former bill depending, touching the matter in question in that bill.⁴ It is treated as a mere auxiliary suit, or as a dependency upon the original suit.⁵ And can be sustained only on matter growing out of the original bill.⁶ New parties cannot be introduced into a cause by a cross-bill.⁷

¹ 17 Ves. 178.

² 2 Ves. 598.

³ *Lubé* Eq. Pl. 39; *Morgan v. Tipton*, 3 McLean, 339; *McConnel v. Hodson*, 2 Gilman, 640.

⁴ *Mitford* Eq. Pl. 80, 81; *Story* Eq. Pl. § 389, 402; *White v. Buloid*, 2 Paige, 364. A purchaser, *pendente lite*, from a party to a suit, may file a bill in the nature of a cross-bill, to make himself a party to the suit, so as to have his rights protected. *Whitback v. Edgar*, 2 Barb. Ch. 106.

⁵ *Story* Eq. Pl. § 309; *Slason v. Wright*, 14 Vermont, 208; *Cross v. De Valle*, 1 Wallace U. S. 1.

⁶ *Daniel v. Morrison*, 6 Dana, 186; *Crabtree v. Banks*, 1 Met. (Ky.) 482; *Slason v. Wright*, 14 Vermont, 208; *Rutland v. Paige*, 24 Vermont, 181.

⁷ *Curtis J. in Shields v. Barrow*, 17 Howard (U. S.) 145. But see *Jones v. Smith*, 14 Ill. 229.

A bill of this kind is usually brought either to obtain a necessary discovery of facts in aid of the defence to the original bill, or to obtain full relief to all parties, in reference to the matters of the original bill.¹ But a cross-bill should never be brought, where the party can obtain, in the original suit, the same relief asked for by the cross-bill.²

The rules of Equity prevent a defendant examining a plaintiff.³ Hence arises the necessity of a cross-bill for discovery, when the testimony of the plaintiff is sought by the defendant as to any material facts.⁴ The cross-bill gives a perfect reciprocity of proof to each party, derivable from the answers of each other.⁵ For example, a deed in the hands of the plaintiff may furnish the main grounds of establishing the defence to the original bill. If the defendant wants a discovery of that deed he must file a cross-bill for that purpose, although the plaintiff should state in his bill, that the deed is in his custody and ready to be produced as the Court shall direct.⁶

It frequently happens, and particularly if any question arises between two defendants to a bill, that the Court cannot make a decree without a cross-bill or cross-bills to bring every matter in dispute completely before the Court.⁷ In such a case it becomes necessary for some one of the defendants to the original bill to file a bill against the plaintiff and other defendants in that bill, or some of them, and bring the litigated point properly before the Court.⁸ One defendant cannot have a decree against a co-defendant without a cross-bill with proper prayer and process, or answer, as in an original suit.⁹

¹ Mitf. Eq. Pl. 81; Story Eq. Pl. § 389.

² *Braman v. Wilkinson*, 3 Barb. S. C. 151; *Tison v. Tison*, 14 Geo. 167; *Bullock v. Brown*, 20 Geo. 472. A cross-bill which seeks no discovery and sets up no defence, which might not have been as well taken by answer, will be dismissed with costs. *Weed v. Small*, 3 Sandf. Ch. 273. Cross-bills are not necessary for the obtaining of credits, or mere matters of discharge; relief thereon can be obtained under the answer. *Alston v. Alston*, 34 Ala. 15.

³ *Colchester v. —*, 1 P. Wms. 595.

⁴ Story Eq. Pl. § 390.

⁵ *Ibid.*

⁶ *Spragg v. Corner*, 2 Cox, 109.

⁷ Mitf. Eq. Pl. by Jeremy, 81; *Rogers v. M'Macham*, 4 J. J. Marsh. 37; *Troup v. Haight*, 1 Hopk. 239.

⁸ Mitf. Eq. Pl. by Jeremy, 81; *Cooper Eq. Pl.* 85; *Pattison v. Hull*, 9 Cowen, 747; *Armstrong v. Pratt*, 2 Wis. 299.

⁹ *Talbot v. M'Gee*, 4 Mouroe, 379. But see *Elliot v. Pell*, 1 Paige, 263.

A cross-bill is a mode of defence.¹ The original bill and the cross-bill are but one cause.² It must be confined to the subject-matter of the original bill, and cannot introduce new and distinct matters not embraced in the original suit, and if it do so, no decree can be founded on those matters.³

If a cross-bill is taken as confessed, it may be used as evidence against the plaintiff in the original suit, on the hearing, and will have the same effect as if he had admitted the same facts in an answer.⁴

A cross-bill may be filed to answer the purposes of a plea *puis darrein continuance* at the common law. Thus, where pending a suit, and after replication and issue joined, the defendant, having obtained a release, attempted to prove it, *viva voce*, at the hearing, it was determined that the release not being in issue in the cause, the Court could not try the fact nor direct a trial at law for that purpose, and that a new bill must be filed to put the release in issue.⁵

A cross-bill, if seasonably filed, may be sustained for the purpose of obtaining an equitable set-off.⁶

It lies to have an agreement, sought to be specifically performed, delivered up or cancelled, for although the plaintiff should obtain a decree under his original bill, he might still bring his action at law for damage sustained by the non-performance.⁷

If the only object of a bill be to enforce a contract, a cross-bill

¹ *Field v. Schieffelin*, 7 John. Ch. 252; *Galatian v. Erwin*, 1 Hopk. 48; S. C. 8 Cowen, 361; *Cartwright v. Clark*, 4 Metcalf, 194; *Nelson v. Dunn*, 15 Ala. 201.

² *Field v. Schieffelin*, 7 John. Ch. 252. And, therefore, when a defendant files a cross-bill on matters clearly cognizable in Equity, the cross-bill will supply any defect in jurisdiction, and place the whole cause before the Court, and impose the duty of granting relief to the party entitled. *Cockrell v. Warren*, 1 Ark. (1 Barb.) 346.

³ *May v. Armstrong*, 3 J. J. Marsh. 262; *Daniel v. Morrison*, 6 Dana, 186; *Galatian v. Erwin*, *Field v. Schieffelin*, *ubi supra*; *Gouverneur v. Elemendorf*, 4 John. Ch. 357; *Griffith v. Merritt*, 19 N. Y. (5 Smith) 529. Although its allegations must relate to the subject-matter, it is not restricted to the issues of the original bill. *Nelson v. Dunn*, 15 Ala. 201.

⁴ *White v. Buloid*, 2 Paige, 164.

⁵ *Mitf. Eq. Pl. by Jeremy*, 82; *Hayne v. Hayne*, 3 Ch. Rep. 19; 3 Swanst. 472, 474; *Story Eq. Pl. § 393*; *Miller v. Fenton*, 11 Paige, 18.

⁶ *Cartwright v. Clark*, 4 Metcalf, 104. See *Troup v. Haight*, 1 Hopk. 239.

⁷ *Coop. Eq. Pl. 86, 87*; *Mont. Eq. Pl. 328*.

to rescind a different contract, and with other parties, about the same property, will not lie. But where the vendor of land, among other things in his bill, asserts a lien for the purchase-money, against an assignee of his covenant for a title, the latter may sustain a cross-bill for a rescission of that contract.¹

Where a bill is filed to set aside an agreement or conveyance the conveyance cannot be confirmed and established without a cross-bill filed by the defendant.²

The defendant may rely upon matters purely legal, connected with the matters of the bill, for his defence, and, by his cross-bill, require the plaintiff to answer thereto.³

It seems, that a cross-bill is always necessary, where the defendant is entitled to some positive relief, beyond what the scope of the plaintiff's suit will afford him.⁴

If it is deemed advisable to file a cross-bill, it should be commenced with as little delay as possible, as will be apparent from a consideration of the particular rules, which are applicable to the proceedings in an original and cross-cause.⁵

The proper time for filing a cross-bill, where such a bill is necessary, is at the time of the putting in the answer to the original suit, and before the issue is joined by the filing of the replication. And as the matters of defence, upon which a cross-bill is founded, must be stated in the answer to the original suit as well as in the cross-bill, it can seldom be necessary to delay the filing of the cross-bill till after the original cause is at issue.⁶

If the cross-bill is not filed before or at the time of answering in the original suit, the delay must be accounted for, or the proceedings will not be stayed.⁷

In *Cartwright v. Clark*,⁸ it was held, that, as a general rule, a cross-bill must be filed before publication of the evidence in the

¹ *Wickliffe v. Clay*, 1 Dana, 589.

² *Carnochan v. Christie*, 11 Wheat. 446.

³ *Hume v. Long*, 6 Monroe, 119.

⁴ *Pattison v. Hull*, 9 Cowen, 747; *Jones v. Smith*, 14 Ill. 229.

⁵ 1 Smith Ch. Pr. (2d Am. ed.) 460.

⁶ *Irving v. De Kay*, 10 Paige, 319, 322. See *Cartwright v. Clark*, 4 Metcalf, 110, 111.

⁷ *White v. Buloid*, 9 Paige, 164. See *Irving v. De Kay*, 10 Paige, 319, 322; *Josey v. Rogers*, 13 Geo. 478.

⁸ 4 Metcalf, 104.

original suit, unless the plaintiff in the cross-bill will go to the hearing upon the proofs already published.¹

Upon hearing a cause, it sometimes appears, that the suit already instituted is insufficient to bring before the Court all matters necessary to enable it fully to decide upon the rights of all the parties.² This most frequently happens where persons in opposite interests are co-defendants, so that the Court cannot determine their opposite interests upon the bill already filed, and the determination of their interests is yet necessary to a complete decree upon the subject-matter of the suit. In such a case, if upon hearing the cause the difficulty appears, and a cross-bill has not been exhibited to remove the difficulty, the Court will direct a bill to be filed, in order to bring all the rights of all the parties fully and properly for its decision, and will reserve the directions or declarations, which it may be necessary to give or make touching the matter not fully in litigation by the former bill, until this new bill is brought to a hearing.³

And if a creditor, who has come in under a decree in favor of creditors against a debtor, should require relief, for the purpose of assisting the investigation of demands affecting the estate, before the Master, which relief cannot be obtained under the original bill, or by a rehearing, he may, even without the direction of the Court, file a cross-bill for the purpose;⁴ for he might not have had an opportunity, at an earlier stage of the proceedings, of presenting his case and his objections.⁵

A cross-bill is prepared and signed by counsel, and engrossed and filed, in the same manner as an original bill.⁶ It seems, that in England, it is not indispensable, that a cross-bill should be filed in the same Court in which the original bill is filed; as for exam-

¹ See also to same point and effect, *Field v. Schieffelin*, 7 John. Ch. 252; *Gouverneur v. Elmendorf*, 4 John. Ch. 357; *Sterry v. Arden*, 1 John. Ch. 62; *Story Eq. Pl.* § 395; *White v. Buloid*, 2 Paige, 164.

² *Field v. Schieffelin*, 7 John. Ch. 252; *Story Eq. Pl.* § 396; *Cartwright v. Clark*, 4 Metcalf, 104.

³ *Mitf. Eq. Pl. by Jeremy*, 82, 83; 1 *Smith Ch. Pr.* (2d Am. ed.) 460; *Story Eq. Pl.* § 396; *Field v. Schieffelin*, 7 John. Ch. 253, 254; *Pattison v. Hull*, 9 Cowen, 747; *Cartwright v. Clark*, 4 Metcalf, 104. And generally, unless directed by the Court, a cross-bill cannot be filed after the hearing on the original bill. *Roberts v. Peavey*, 9 Foster (N. H.) 392.

⁴ *Latouch v. Dunsany*, 1 Sch. & Lef. 137.

⁵ *Story Eq. Pl.* § 397.

⁶ 1 *Smith Ch. Pr.* (2d Am. ed.) 461.

ple, if the original bill had been brought in the Court of Exchequer, whilst that Court had Equity jurisdiction, the cross-bill might be brought in the Court of Chancery.¹

Whether the like doctrine is maintainable in the Courts of America may admit of a question. But, at all events, there cannot be a cross-bill in a State Court to an original bill pending in the Circuit Court of the United States. If any cross-bill is wanted in such a case, it should be brought in the same Circuit Court in which the original bill is depending, as it is not an original, but an ancillary suit.²

A cross-bill should state the original bill and the proceedings thereon, and the rights of the party exhibiting the bill, which are necessary to be made the subject of cross-litigation, or the ground, on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill.³

It must be confined to the subject-matter of the original bill, and cannot introduce new and distinct matters not embraced in the original suit, and if it do so, no decree can be founded on those matters,⁴ for, as to such matters, it is an original bill, and they cannot properly be examined at the hearing of the first suit.⁵

The plaintiff in a cross-bill cannot contradict the assertions in his answer in the original suit.⁶ And where the allegations of a cross-bill are inconsistent with the admissions of the answer to the original bill, they cannot be taken as true though unanswered.⁷

A demurrer was allowed to a cross-bill to have usurious secu-

¹ Cooper Eq. Pl. 87; *Glegg v. Leigh*, 4 Madd. 192; *Parker v. Leigh*, 6 Madd. 115; Story Eq. Pl. § 400, (3d ed.) note (4).

² Story Eq. Pl. § 400.

³ *Ib.*; Mitf. Eq. Pl. by Jeremy, 81; Story Eq. Pl. § 401. See *Allen v. Allen*, 14 Ark. (1 Barb.) 666.

The Statute of Mississippi authorizing a defendant to make his answer a cross-bill against the plaintiffs or his co-defendants, or all of them, "upon which no subpoena shall be required to issue, unless new parties are introduced," enables the defendant to make co-defendants to the original bill defendants to the cross-bill without notice by process, but does not authorize the introduction of persons not parties to the suit. *Lardner v. Ogden*, 31 Miss. (2 George) 332.

⁴ *May v. Armstrong*, 3 J. J. Marsh. 262; *Daniel v. Morrison*, 6 Dana, 186; *Galatian v. Erwin*, 1 Hopk. 48; *S. C. 8 Cowen*, 361; *Josey v. Rogers*, 13 Geo. 478; *Andrews v. Hobson*, 23 Ala. 219.

⁵ *Ib. Ib. Ib.*; Story Eq. Pl. § 401.

⁶ *Hudson v. Hudson*, 3 Rand. 117.

⁷ *Savage v. Carter*, 9 Dana, 414. See *Dill v. Shahan*, 25 Ala. 694.

rities delivered up, because it did not offer to pay the sum really due.¹

But as a cross-bill is considered a mode of defence, or a proceeding to procure a complete determination of a matter already in litigation in the Court, the plaintiff is not, at least, as against the plaintiff in the original bill, obliged to show any ground of Equity to support the jurisdiction of the Court.² It is treated, in short, as a mere auxiliary suit, or as a dependency upon the original suit.³

Whenever a cross-bill is brought against co-defendants in a suit, the plaintiff in such suit must be named a defendant together with them.⁴

In New York, if the plaintiff in a cross-bill wishes an order to stay proceedings in the original suit, the cross-bill must be verified by some person, who knows the facts,⁵ and a certificate of counsel should be obtained, stating that he believes a stay of proceedings, in the original suit, to be necessary for the attainment of justice in the cause, and that the cross-bill is not intended for delay.⁶

The appearance of the defendant to a cross-bill is enforced in the same manner as to an original bill, by subpœna, a copy of which writ is served either personally on the defendant, or by leaving the same at his dwelling-house.⁷ An order for substituted service, of the subpœna to appear, on the clerk in Court, or solicitor concerned for the plaintiff in the original suit, is irregular, there being no analogy between the case of a defendant to a cross-bill, and that of a defendant to a bill in Equity to stay proceedings at law, in which proceedings at law, the defendant is a plaintiff.⁸

The first peculiarity in the proceedings of a cross-bill is, that the plaintiff in the original cause is entitled to have an answer to his

¹ *Mason v. Gardiner*, 4 Bro. C. C. (Perkins's ed.) 436. See also *ib.* 438, note (a).

² *Cartwright v. Clark*, 4 Metcalf, 104; Story Eq. Pl. § 399; Mitf. Eq. Pl. by Jeremy, 81, 82; *Burgess v. Wheate*, 1 Eden, 190; *Doble v. Potman*, Hardr. 160; *Kemp v. Mackrell*, 3 Atk. 812; *Nelson v. Dunn*, 15 Ala. 501.

³ 7 Story Eq. Pl. § 339; *Slason v. Wright*, 14 Vermont, 208.

⁴ Cooper Eq. Pl. 85.

⁵ *Talmadge v. Bell*, 9 Paige, 410.

⁶ *White v. Buloid*, 2 Paige, 164.

⁷ 1 Smith Ch. Pr. (2d Am. ed.) 461. See *Anderson v. Ward*, 5 Monroe, 420.

⁸ 1 Smith Ch. Pr. (2d Am. ed.) 461, and note (1); Hoff. Ch. Pr. 355.

bill before he can be compelled to answer the cross-bill.¹ To sustain this privilege, however, the plaintiff in the original suit must obtain an order for the purpose, which allows him a certain time to answer the cross-bill, after the defendant, in the original cause, has put in his answer to the original suit. This order may be obtained, although the plaintiff in the cross-cause may be in a situation to enforce an answer first; and it was in *Harris v. Harris*,² granted to the plaintiff in the original cause, notwithstanding he, as defendant to the cross-cause, had obtained an order for time to answer.³ Unless this order is obtained and served, the plaintiff in the cross-cause is at liberty to enforce an answer to his bill, by process of contempt, and thus altogether to deprive the first plaintiff of his priority of right to an answer.⁴ In *Turner v. Hill*, and *Hill v. Turner*,⁵ the answer to the original bill was reported insufficient, and the plaintiff obtained an order to amend, and for the defendant to answer the amendments and exceptions at the same time. The defendant then filed a cross-bill. On the 6th of November, the plaintiff in the original suit obtained an order, that he should have a fortnight's time to answer the cross-bill, after answer to the original bill. Before the order was served on the defendant Hill, he issued an attachment against Turner for want of answer to the cross-bill. On the application of defendant Hill, the order of 6th of November was discharged.⁶

At the expiration of the time allowed to answer the cross-bill after the original bill has been answered, the plaintiff in the cross-suit is entitled to an answer to his bill, and the defendant in the cross-suit is not entitled as of course to any further time.⁷

The priority of answer, to which the original plaintiff is entitled, extends as against those, who claim as representatives of the

¹ By a rule of the Supreme Court of the United States, where a defendant in Equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto, before the original plaintiff shall be compelled to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party, filing the cross-bill, at the hearing, in the same manner and under the same restrictions as the answer, praying relief, may now be read and used. Equity Rule 72.

² *Turn. & Russ.* 165.

³ 1 *Smith Ch. Pr.* (2d Am. ed.) 461, 462.

⁴ *Ib.* 462.

⁵ Cited 1 *Smith Ch. Pr.* (2d Am. ed.) 462.

⁶ 1 *Smith Ch. Pr.* (2d Am. ed.) 462, 463.

⁷ See *Noel v. King*, 3 *Mad.* 183; 1 *Smith Ch. Pr.* (2d Am. ed.) 463.

plaintiffs, or one of them, in the cross-cause. Thus in a case, where A brought his bill against B and C, who put in insufficient answers, and preferred their cross-bill against A; after which B became a bankrupt, and his assignees brought a bill in the nature of a bill of revivor against A; the Court held, that the assignees of B should not go on till C had answered A's bill.¹

The priority of answer, allowed to the plaintiff in the original cause, may be waived and transferred to the plaintiff in the cross-cause, by the plaintiff's amending his original bill in matters immaterial² after the filing of the cross-bill.³

The proceedings in the original suit are not stayed merely by the amendment,⁴ but the plaintiff in the cross-bill, upon material⁵ amendments being made, must obtain an order, that the proceedings in the original bill be stayed until the plaintiff shall have fully answered the cross-bill.⁶

If such order is not obtained, the plaintiff in the original cause is warranted in issuing an attachment for want of an answer, and otherwise proceeding with his original suit.⁷ This last order, giving a priority of answer to the plaintiff in the cross-cause, may be obtained either upon a petition or a motion as of course.⁸

The reason why the plaintiff in the original cause loses his priority, is, that the amended bill, as to the amendments, is a new bill, and the cross-bill being filed prior to the amendments, and the original and amended bill being considered as one record, the priority of answer is lost as to the whole.⁹

The general rule, that the plaintiff in the original suit loses his priority of answer, by materially amending the original bill, is not varied although the defendant has put in an insufficient answer, and although the order to amend is made on the terms, that the defendant may answer the amendments and exceptions together.¹⁰

¹ *Child v. Frederick*, 1 P. Wms. 266.

² So, it seems, though the amendment is in matter immaterial. *Johnson v. Freer*, 2 Cox, 371; *Noel v. King*, 2 Madd. 394.

³ *Steward v. Roe*, 2 P. Wms. 435.

⁴ *Noel v. King*, 2 Madd. 394.

⁵ So, it seems, though the amendment is in matter immaterial. *Johnson v. Freer*, 2 Cox, 371; *Noel v. King*, 2 Madd. 394.

⁶ *Noel v. King*, 2 Madd. 394.

⁷ *Ibid.*

⁸ 1 Smith Ch. Pr. (2d Am. ed.) 464.

⁹ *Steward v. Roe*, 2 P. Wms. 434.

¹⁰ *Meade v. Duchess of Buckingham*, cited 1 Smith Ch. Pr. (2d Am. ed.) 464.

In *Long v. Burton*,¹ after the answer to the original bill had been reported insufficient, the defendant filed a cross-bill. The plaintiff in the original suit obtained an order, that the original bill should be answered before he answered the cross-bill, and on the answer being reported insufficient, he obtained an order to amend his bill, and that the defendant might answer the amendments and exceptions together. It was held that the order to amend was a waiver of the priority of suit.²

A plea was allowed to an original bill, then the defendant filed a cross-bill, to which an answer was put in, which was alleged to be insufficient. The plaintiff in the original suit then amended his bill, and the plaintiff in the cross-suit moved for time to answer the amended bill, after the defendant had answered the cross-bill. The motion was granted at the Rolls, and affirmed by the Lord Chancellor on the Master's report of insufficiency, which report was procured pending the motion.³

An original bill abated by the act of the plaintiff, and not revived until after a cross-bill filed, loses its priority.⁴

But the plaintiff in the original suit does not waive his priority by obtaining the common orders for time to answer the cross-bill.⁵

Although the plaintiff in the original suit is entitled to stay the proceedings in the cross-suit, until the defendant in the original suit has answered, the plaintiff in the cross-suit has not the same privilege, unless the original plaintiff by amending his bill loses his priority of suit.⁶

The plaintiff in the original suit is not obliged, in any case, to stay proceedings thereon upon the filing of a cross-bill, except by a special order of the Court,⁷ founded on notice of the application for delay, given to the plaintiff in the original suit.⁸ And it is not a matter of course for the Court to stay the proceedings in the original suit, in any case, except where the defendant in the cross-suit is in contempt for not answering.⁹

¹ 2 Atk. 218.

² See 1 Smith Ch. Pr. (2d Am. ed.) 464.

³ *Ratray v. Darley*, 3 Atk. 724.

⁴ *Smart v. Floyer*, Dick. 260.

⁵ *Harris v. Harris*, 1 Turn. & Russ. 165; — *v. Southall*, 1 Younge, 330.

⁶ 1 Smith Ch. Pr. (2d Am. ed.) 465; *Williams v. Carle*, 2 Stockt. (N. J.) 543.

⁷ *White v. Buloid*, 2 Paige, 164; *Williams v. Carle*, 2 Stockt. (N. J.) 545.

⁸ *Cartwright v. Clark*, 4 Metcalf, 104; *White v. Buloid*, 2 Paige, 164; *Williams v. Carle*, 2 Stockt. (N. J.) 545.

⁹ *White v. Buloid*, 2 Paige, 164; *Williams v. Carle*, 2 Stockt. (N. J.) 545.

All the plaintiffs in the cross-bill must join in the application to stay proceedings. And to entitle them to an order to stay the proceedings, it is necessary the matters stated in the cross-bill should be sworn to by some person, who knows the facts.¹

In *Rankissenseat v. Barker*,² it is laid down, that the general rule is not to stay proceedings in an original cause till the answer comes in to the cross-bill, but only to enlarge publication in the original cause, until the plaintiff in that cause shall have fully answered the cross-bill; and in *Coates v. Pearson*,³ the Court refused to stay the progress of an original cause, which had been set down, although no answer had been filed to the cross-bill, observing, if the cross-bill is filed in due time, the plaintiff in the cross-suit may move to stay publication in the original cause until an answer has been put in.⁴ And the circumstance of the defendant to the cross-bill being in contempt for want of his answer to that bill, does not entitle the plaintiff in the cross-suit to stay proceedings in the original cause, but only to enlarge publication.⁵

In *Young v. Potts*,⁶ after the cause on the original bill was set down for hearing, the defendant was informed, that the plaintiff was a nominal one, and that the real plaintiff was a citizen of the same State with the defendant, (which deprived the Court of jurisdiction) and he immediately filed a cross-bill, charging this fact, and asking a discovery, and the hearing on the original bill was stayed until the cross-bill was answered.⁷

After answer the defendant filed a cross-bill. The plaintiff in the original cause, before filing his answer to the cross-bill, filed a supplemental bill against the plaintiff in the cross-suit. The plaintiff in the cross-suit moved to stay the answer to the supplemental bill until his cross-bill had been answered, which was ordered upon debate.⁸ So where the original bill abated before answer by the marriage of the plaintiff, and, before revival, the defendant filed a

¹ *Talmadge v. Pell*, 9 Paige, 410.

² 1 Atk. 20.

³ 4 Madd. 20.

⁴ See *Gardiner v. Mason*, 4 Bro. C. C. 436, cited 1 Smith Ch. Pr. (2d Am. ed.) 465.

⁵ *Creswick v. Creswick*, 1 Atk. 290; Story Eq. Pl. 395; see *White v. Buloid*, 2 Paige, 164, and *Young v. Potts*, 4 Wash. C. C. 521.

⁶ 4 Wash. C. C. 521.

⁷ See *Brown v. Beel*, 4 Hayw. 287.

⁸ *Urquhart v. Turner*, cited 1 Smith Ch. Pr. (2d Am. ed.) 466.

cross-bill, Lord Hardwicke held that the plaintiffs in the original cause lost their priority of answer, and discharged the order obtained by them for a month's time to answer the cross-bill, after the original bill was answered.¹

The original cause and cross-cause are usually, although not necessarily,² heard together, and they are considered so united, that the plaintiff in the cross-cause is bound to set down his cause in the same Court as that in which the original cause is set down.³

This applies where both causes are at issue or in a situation to be heard, and then the plaintiff in the cross-suit may have an order, that they be heard together. But the delay of the plaintiff in the cross-suit will not be permitted to delay the hearing of the original cause.⁴ The order, that the causes may be heard together, is obtained on a motion *ex parte*, and a copy of the order should be served.⁵

In *Field v. Schieffelin*,⁶ it is said, "for whatever purpose the cross-bill may be used, if it comes in after publication, the plaintiff in it cannot take proof to any point, to which he has already examined, for this would contravene the principles of the Court." "The object of the rule is to prevent the danger of perjury."⁷

The depositions in the cross-cause, to distinct matters, can of course be read; and if no witnesses have been examined in the original suit, the testimony in the cross-suit can be used.⁸

So if no witnesses are examined in the cross-suit, the depositions in the original suit may be read. But the point in issue must be the same in both causes.⁹

The testimony taken in a cross-cause may be read, although the bill be dismissed,—saving just exceptions.¹⁰

¹ *Smith v. Floyer*, Dick. 262.

² *Coleman v. Moore*, 3 Litt. 355.

³ 1 *Smith Ch. Pr.* (2d Am. ed.) 468. See *Story Eq. Pl.* § 395; *Reed v. Kemp*, 16 Ill. 445.

⁴ *White v. Buloid*, 2 Paige, 164. See *Story Eq. Pl.* § 395.

⁵ *Hand's Sol. Ass.* 106; *Hinde*, 54.

⁶ 7 *John. Ch.* 252, 253.

⁷ See *Story Eq. Pl.* § 395; *White v. Buloid*, 2 Paige, 164; *Wilford v. Beasley*, 3 Atk. 501; *Taylor v. Obee*, 3 Price, 26, 83; *Kinsey v. Kinsey*, 2 Vesey Sen. 578.

⁸ *Wilford v. Beasley*, 3 Atk. 501.

⁹ *Christian v. Wrenn*, *Bunbury*, 321.

¹⁰ *Lubiere v. Genon*, 2 Vesey Sen. 579. See *Christian v. Wrenn*, *Bunbury*,

In a case where all the objects sought by a cross-bill might have been attained by proper answers and proceedings under the original bill, and the cross-bill was thence unnecessary, it was dismissed without costs to either party.¹

CHAPTER XXXV.

BILL OF INTERPLEADER.

WHERE two or more persons claim the same thing, by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be injured by some of them, he may exhibit a bill of interpleader against them, and pray that the claimants may be restrained from proceeding till the right is determined.²

321. A plaintiff cannot make his answer a cross-bill to the defendant's cross-bill, for the reason that the new matter can only be brought before the Court by an amended or supplemental bill. *Brown v. Troup*, 33 Miss. (4 George) 35.

¹ *Bogle v. Bogle*, 3 Allen, 158, 161.

² Mitf. Eq. Pl. by Jeremy, 48, 49; *Dungey v. Angove*, 2 Sumner's Vesey, 309, 310; *Angell v. Hadden*, 15 ib. 244; *Eden Injunct.* (2d Am. ed.) 393, 394; *Stevenson v. Anderson*, 2 Ves. & Bea. 407; *Morgan v. Marsack*, 2 Mer. 107; *Story Eq. Pl.* § 291, 292; *Crawshay v. Thornton*, 7 Sim. 391; *S. C.* 2 Cr. & Phil. 1, 21; *Bedell v. Hoffman*, 2 Paige, 199; *Atkinson v. Manks*, 1 Cowen, 691; *Bell v. Hunt*, 3 Barb. Ch. 391; *Strange v. Bell*, 11 Geo. 103; *Greene v. Mumford*, 4 Rhode Isl. 313; *Providence Bank v. Wilkinson*, 4 Rhode Isl. 507; *Farley v. Blood*, 10 Foster (N. H.) 354; *Hayes v. Johnson*, 4 Ala. 267. In *Hoggart v. Cutts*, 1 Cr. & Phil. 204, Lord Cottenham said: "The definition of interpleader is not, and cannot now be disputed. It is where the plaintiff says, I have a fund in my possession, in which I claim no personal interest, and to which you, the defendants, set up conflicting claims; pay me my costs, and I will bring the fund into Court, and you shall contest it between yourselves. The case must be one in which the fund is matter of contest between two parties, and in which the litigation between those parties will decide all their respective rights with regard to the fund." See, also, 2 *Story Eq. Jur.* 817 *b*; *Shaw v. Coster*, 8 Paige, 339; and generally upon this subject, 2 *Story Eq. Jur.* § 800 to 824; *Horton v. Baptist Church and Society in Chester*, 34 Vermont, 309.

To justify a bill of interpleader, there should be either some specific chattel, or some definite sum of money, to which different parties in the same right, or in privity of estate, make claim, and the person bringing the bill should be a mere stakeholder, having no interest in the matter; so that when the Court decree an interpleader, the plaintiff can step out of the case altogether. *Lincoln v. Rut. &*

The ground of the jurisdiction, in a simple bill of interpleader, is the danger of injury to the plaintiff from the doubtful and conflicting claims of the several defendants, as between themselves.¹

A claim made upon a party affords a ground for his filing a bill of interpleader, though no legal proceedings have been actually commenced against him.²

Even a liability to be called on by different persons for the demand gives a right to file such a bill, to determine which of the parties is entitled.³

A bill of interpleader may be filed, though the claim of one of the defendants is actionable at Law and that of the other in Equity.⁴

It is no objection to an interpleading bill, that a suit between the several parties, commenced by one of the claimants of the fund, is pending.⁵

The plaintiff in a bill of interpleader, strictly so called, can claim no relief against either of the defendants, but only ask for leave to pay the money or deliver the property to the one to whom it, of right, belongs, in order that he may thereafter be protected

Bur. R. R. Co., 24 Vermont, 639. An interpleader may be allowed where real estate is the subject of controversy. *Farley v. Blood*, 10 Foster (N. H.) 354.

¹ *Mohawk & Hudson R. R. Co. v. Clute*, 4 Paige, 392; Mitf. Eq. Pl. by Jeremy, 49; *Atkinson v. Manks*, 1 Cowen, 703; *Langston v. Boylston*, 2 Sumner's Vesey, 101, note (a); Story Eq. Pl. § 291, 292; *Eden Injunct.* (2d Am. ed.) 395, 396, 397; *Woods J. in Farley v. Blood*, 10 Foster (N. H.) 361; *Badeau v. Rogers*, 2 Paige, 209; *Griggs v. Thompson*, 1 Geo. Decis. 146.

² *Langston v. Boylston*, 2 Sumner's Vesey, 101, 107, note (1) and cases cited; *Dungey v. Angove*, ib. 310; *Angell v. Hadden*, 15 ib. 247, Mr. Hovenden's note (1); *Richards v. Salter*, 6 John. Ch. 445; *Morgan v. Marsack*, 2 Mer. 107; *Gibson v. Goldthwaite*, 7 Ala. 281. A party not positively claiming the fund, but not assenting to the payment of it to another claimant, when required to do so, was properly made defendant to a bill of interpleader, and had to pay the costs. *Fenn v. Edmonds*, 5 Hare, 314. But see *Desboro v. Harris*, 5 De G., M. & G. 439, 455.

³ *Duke of Bolton v. Williams*, 2 Sumner's Vesey, 152; *East India Co. v. Edwards*, 18 ib. 377; *Angell v. Hadden*, 15 ib. 247, Mr. Hovenden's note (1). An interpleader was not allowed in a case where the title did not appear doubtful, and no counter-claim was made actively. *Desboro v. Harris*, 5 De G., M. & G. 439, 455.

⁴ *Richards v. Salter*, 6 John. Ch. 445; *Yates v. Tisdale*, 3 Edw. Ch. 71; *Schnyler v. Pelissier*, 3 Edw. Ch. 191; *Doran v. Everitt*, 2 Irish Eq. 28; *Paris v. Gilham*, Cooper, 56; *Martinius v. Helmuth*, 2 Ves. & Bea. 412 (2d ed.); *Morgan v. Marsack*, 2 Mer. 107.

⁵ *Warrington v. Wheatstone*, 1 Jac. 202; *City Bank v. Bangs*, 2 Paige, 570.

from the claims of both. This bill should not be filed, except in a case, where the plaintiff can in no other way be protected from an unjust litigation, in which he has no interest.¹ But it would seem from some cases, that a party may be allowed to resort to a bill of interpleader, and to ask the Court to tell him to which of several claimants of a fund or other thing in his hands, he may pay or deliver it, although he might be able, by great attention and caution, to make himself secure. He may secure himself by a single suit, instead of remaining liable to as many suits as there are claimants, where one payment ought to discharge him.²

If the plaintiff himself claims any interest in the property in dispute, he cannot sustain the bill.³ Nor, if the plaintiff appears to be under liability to any of the defendants in respect of the property.⁴ As, if an action is brought against an auctioneer for a deposit, he cannot file a bill of interpleader, if he insists upon retaining either his commission or the duty.⁵

The plaintiff cannot sustain this bill where he is obliged to admit, that as to either of the defendants he is a wrong-doer.⁶ Nor

¹ *Bedell v. Hoffman*, 2 Paige, 199; *Badeau v. Rogers*, 2 Paige, 209; *Atkinson v. Manks*, 1 Cowen, 691. Such bills are not encouraged, on account of the delay and expense which they occasion. *Greene v. Mumford*, 4 Rhode Isl. 313; *Bedell v. Hoffman*, *supra*; *Farley v. Blood*, 10 Foster (N. H.) 361. Nor is an interpleader necessary, so long as the course pursued by the defendants will determine their right without it. *Sieveking v. Behrens*, 2 M. & C. 581.

² *Farley v. Blood*, 10 Foster (N. H.) 363; *Per Woods J.*, *Lozier v. Van Saun*, 2 Green Ch. 325.

³ *Atkinson v. Manks*, 1 Cowen, 691; *Moore v. Usher*, 7 Sim. 384; *Mitchell v. Hayne*, 2 Sim. & Stu. 63; *Aldridge v. Thompson*, 2 Bro. C. C. (Perkins's ed.) 150; *Adams v. Dixon*, 19 Georgia, 513; *Lozier v. Van Saun*, 2 Green Ch. 325. The interpleader can justly be allowed only when no other question than the right of property is meant to be litigated. *Sherman v. Partridge*, 4 Duer (N. Y.) 646. It must be denied, when it is alleged that the person seeking to be discharged as a mere depositary, is liable upon any ground independent of the title; *Sherman v. Partridge*, *supra*; so where he has an interest or duty to protect one of the parties rather than the other; as, an executor standing between two claimants, one of whom claims by title paramount to the testator's, and the other as a legatee under the will, is not in a position to sustain a bill of interpleader, his duty being clearly to protect the interest of the legatees. *Adams v. Nixon*, 19 Georgia, 513. So where he claims to pay less than is demanded of him. *Diploek v. Hammond*, 2 S. & G. 141.

⁴ *Crawshay v. Thornton*, 2 M. & C. 1; *Pearson v. Cardon*, 2 R. & M. 607.

⁵ *Mitchell v. Hayne*, 2 Sim. & Stu. 63.

⁶ *Shaw v. Coster*, 8 Paige, 339; *Quinn v. Green*, 1 Ired. Eq. 229; *Slingsby v. Boulton*, 1 Ves. & B. 334; *Quinn v. Patton*, 2 Ired. Eq. 48.

can the plaintiff have relief where it appears that the double claim has been caused by his own act or conduct.¹

Where the claimants assert their rights under adverse titles, and not in privity, and where their claims are of different natures, the bill is wholly unobtainable.²

Where the party holding the fund may be discharged from all liability by payment and delivery to one, a bill of interpleader may be dispensed with.³

It is not necessary to file a bill of interpleader, where the holder of the fund is already a party to a suit in chancery, brought by one claimant against the other, to settle the right to the fund in his hands. The holder of the fund, in such a case, should apply by petition in that suit, for leave to pay the fund into Court to abide the event of the litigation between the other parties.⁴ But in the case of *Birch v. Corbin*,⁵ where money in the funds was the subject of a suit, to which the bank was a defendant, Lord Thurlow refused, upon the application of the bank, to make any order upon the litigating parties, to restrain them from proceeding at law against the bank, to compel a transfer. He said the bank must be considered as a private person, who is a stakeholder, and as such was most certainly entitled to file a bill of interpleader; but it was certainly necessary for them to apply in the shape of plaintiffs.⁶

A bill of interpleader ought to be filed before, or immediately

¹ *Crawshay v. Thornton*, 2 M. & Cr. 1; *Desboro v. Harris*, 5 De G., M. & G. 439. The plaintiff cannot have relief by interpleader, where he is sued by a party for the price of goods he has purchased of him, and by a third party for the value of the goods in trover. *Slaney v. Sidney*, 14 Mees. & W. 801, per Alderson B.; *James v. Prichard*, 7 Mees. & W. 216.

² Mitf. Eq. Pl. by Jeremy, 142, 143, note (r); *Dungey v. Angove*, 2 Sumner's Vesey, 304; *Nicholson v. Knowles*, 5 Madd. 47; *Harlow v. Crowley*, 1 Buck. B. C. 273; Story Eq. Pl. § 293; *Crawshay v. Thornton*, 7 Sim. 391; *Jew v. Wood*, 3 Beav. 579; S. C. 1 Cr. & Phil. 185; *City Bank v. Bangs*, 2 Paige, 570; *Slaney v. Sidney*, 14 Mees. & W. 801; *Glyn v. Duesbury*, 11 Sim. 139. And the several defendants must claim an interest in the whole fund. *Hoggart v. Cutts*, Cr. & Phil. 197; *Bignold v. Audland*, 11 Sim. 23; *Yates v. Tisdale*, 3 Edw. Ch. 71. But see *Hamilton v. Marks*, 5 De G. & S. 638. And the bill must be framed so that the decree may embrace the whole of it. *Crawford v. Fisher*, 1 Hare, 436; *Hoggart v. Cutts*, *supra*.

³ *Schuyler v. Pelissier*, 3 Edw. 191.

⁴ *Badeau v. Rogers*, 2 Paige, 209.

⁵ 1 Cox, 144.

⁶ See *Eden Injunct.* (2d Am. ed.) 400, 401.

after the commencement of proceedings at law, and should not be delayed until after a verdict or judgment has been obtained.¹

Where the plaintiff had offered to pay over the fund, on being indemnified, and that being refused, had filed his bill, with reasonable diligence, he was not charged with *interest* on the money deposited in Court.²

Where a deposit is paid to an auctioneer at a sale, and there arises a dispute between the vendor and a purchaser, and an action is commenced or threatened by either for the deposit, there the remedy of the auctioneer is by this description of bill.³

A party who is taxed in two different towns for the same property, which is only liable to be taxed once, it being doubtful to which town the right to tax belongs, may file a bill of interpleader to compel the collectors of the tax to settle the right between themselves.⁴

Underwriters may sustain this bill against the different creditors of an insolvent debtor, claiming the fund proceeding from an insurance made for account of the debtor, some on the ground of special liens, and others under the assignment. But upon such a bill, those of the co-defendants, who fail to establish any right to the fund, are not entitled to an account, from the defendants whose claims are allowed, of the amount and origin of those claims.⁵

¹ *Cornish v. Tanner*, 1 Younge & Jer. 333; *Union Bank v. Kerr*, 2 Md. Ch. Decis. 460.

² *Richards v. Salter*, 6 John. Ch. 445.

³ *Mitchell v. Hayne*, 2 Sim. & Stu. 63. See *Farebrother v. Prattent*, Daniel's Rep. 64.

⁴ *Mohawk & Hudson R. R. Co. v. Clute*, 4 Paige, 384; *Thompson v. Ebbetts*, 1 Hopk. 272; *Redfield v. Supervisors of Genesee County*, 1 Clarke, 42. But in *Greene v. Mumford*, 4 Rhode Isl. 313, it was said that, it would seem that such a bill cannot be maintained by trustees, when the trust property is taxed in two different towns, against the respective tax-collectors of those towns, to compel them to litigate the right to tax the same property with each other, the tax in one town being different from and larger than the tax in the other; and it certainly cannot be, where it appears that the trust property is partly taxable in the one, and partly in the other town, and so is subject to a double liability. See, also, *Mohawk & Hud. R. R. Co. v. Clute*, 4 Paige, 384, in which it is suggested that, where the claims are for different amounts, the plaintiff should offer to bring into Court the largest sum claimed, or pay the excess to the claimant of the larger sum, and leave the amounts claimed by each party equal, in a case where there are but two claimants.

⁵ *Spring v. South Car. Ins. Co.*, 8 Wheat. 268.

A bill of interpleader lies upon color of title given to a stranger ; as where A contracted to supply B with certain articles at certain prices, and A afterwards assigned the contract to C, and C made demand on B, B is entitled to make A and C interplead.¹

In a case where A deposited goods with B, a warehouseman, to await his direction, and afterwards A directed B to transfer the goods to C, and to hold them at his disposal, and B made the transfer accordingly, the goods were then claimed by D as having been consigned to him by A. It was held, that B was entitled to file a bill of interpleader against C and D.² So upon general principles of Equity jurisprudence, a bank may be entitled to relief by a bill of interpleader against separate and adversary parties who claim title to moneys therein deposited,³ or to shares in the stock of the bank.⁴ A receiver of funds, arising from a sale of lands, made under order of Court, to which funds two persons make claim, may have his bill of interpleader against the two claimants, to compel them to settle their claims as between themselves.⁵

A master of a vessel may maintain such a bill, where parties claim adversely under the bill of lading, but not where the adverse claims are not under the bill of lading, but paramount to it.⁶

So an agent, who has received bills of exchange, to procure payment for his principal, may compel the principal, and a claimant, and a creditor of the claimant, to interplead.⁷

Where a principal has created a lien in favor of another person, on funds in the hands of his agent, the agent may file a bill of interpleader against the principal and the other claimant.⁸

An interpleader was allowed, in a case, where an attorney

¹ *East India Co. v. Edwards*, 18 Sumner's Vesey, 376.

² *Pearson v. Cardon*, 4 Sim. 218. See *Mason v. Hamilton*, 5 Sim. 19 ; *Cooper v. De Tastet*, Tamlyn, 177.

³ *City Bank of New York v. Skelton*, 2 Blatch. C. C. 14.

⁴ *Providence Bank v. Wilkinson*, 4 Rhode Isl. 507.

⁵ *Winfield v. Bacon*, 24 Barb. (N. Y.) 154.

⁶ *Lowe v. —*, 3 Madd. 277 ; *Mont. Eq. Dig.* 236. But see *Eden Injunct.* (2d Am. ed.) 397, 398.

⁷ *Stevenson v. Anderson*, 2 Ves. & Bea. 407.

⁸ *Smith v. Hammond*, 6 Sim. 16 ; *Wright v. Ward*, 4 Russ. 215, 220 ; 2 Story Eq. Jur. § 817 a ; *Gibson v. Goldthwaite*, 7 Ala. 281. An attorney, who has collected money, may file a bill of interpleader in respect to the same against several persons, who claim it by a title derived from the person who left the debts for collection, although he may be entitled to retain a part for his services. *Gibson v. Goldthwaite*, 7 Ala. 281.

claimed a lien upon a sum awarded as damages, under a judgment obtained by the client against the plaintiff.¹

A defendant who wishes to obtain an injunction against a judgment, on the ground that he cannot safely pay it, may file a bill of interpleader against the parties appearing to be entitled, and pay the money into Court, to be held for the benefit of the party appearing to be entitled.²

To maintain this bill, the plaintiff must be in possession. A plaintiff having parted with the possession of property, cannot sustain an interpleading bill against different claimants, upon an undertaking to pay over the value to the party entitled.³

So where an administrator has never reduced the assets into possession, but they are in the hands of some of the distributees, who claim adversely to him, he cannot maintain a bill of interpleader against them.⁴ An executor cannot file a bill of this character before he has proved the will.⁵

But in a case in Connecticut where the plaintiff had paid over the money to one of the defendants, under a claim of right to which he was bound to submit, it was held that this did not prevent his sustaining the bill.⁶

The sheriff levying upon goods alleged to be in settlement cannot maintain a bill of interpleader.⁷

A sheriff, who by virtue of an execution, levies upon property claimed by a third person, adversely to the sheriff and creditor, cannot file a bill of interpleader against such third person and the plaintiff in the execution, to have them settle the right to the property between themselves.⁸ Nor can a sheriff maintain a bill

¹ — *v. Bolton*, 18 Sumner's Vesey, 292; *Gibson v. Goldthwaite*, 7 Ala. 281.

² *Fowler v. Lee*, 10 Gill & John. 358.

³ *Burnett v. Anderson*, 1 Mer. 405.

⁴ *Martin v. Maberry*, 1 Dev. Eq. 169.

⁵ *Mitchell v. Smart*, 3 Atk. 606. For cases of bills brought by executors in the nature of bills of interpleader seeking instructions of the Court, see *Houghton v. Kendall*, 7 Allen, 72; *Andrews v. Bishop*, 5 Allen, 490; *Loring v. Thorndike*, 5 Allen, 257.

⁶ *Nash v. Smith*, 6 Conn. 421, 427. See also to the same effect, *Jew v. Wood*, 1 Cr. & Phil. 186; S. C. 3 Beav. 579.

⁷ *Slingsby v. Boulton*, 1 Ves. & Bea. 334; 1 Smith Ch. Pr. (2d Am. ed.) 472, 473.

⁸ *Shaw v. Coster*, 8 Paige, 339; *Quinn v. Green*, 1 Ired. Eq. 229; *Quinn v. Patton*, 2 Ired. Eq. 48; *Parker v. Barker*, 42 N. Hamp. 78. But see *Storrs v. Payne*, 4 Hen. & Munf. 506; *Lawson v. Jordan*, 19 Ark. 297.

of interpleader against several creditors, where a controversy arises as to the application of the money in his hands, derived from a sale of a debtor's property on execution. His remedy is by an application to the summary jurisdiction of the Court from which the process issues.¹

If the plaintiff does not show a clear title in himself to sustain the bill, it will be dismissed, however proper in other respects the case might be for an interpleader. Thus, if the bill should show, that the title of the plaintiff is that of an agent for one of the parties only, as if he had received money by the authority of his principal and for his use, he would be bound to pay over the money to his principal, notwithstanding any intervening claims of a third person ; for a mere agent to receive for the use of another cannot be converted into an implied trustee by reason of an adverse claim since his possession is the possession of his principal.²

A tenant cannot, as a general rule, sustain a bill of interpleader against his landlord merely on the ground that a stranger sets up an adverse title to the estate ;³ for it would be extremely mischievous, if a tenant were allowed (in his own right or that of others) to call in question the title of the person under whom he holds.⁴ Besides, in such case, the landlord and stranger cannot

¹ *Parker v. Barker*, 42 N. Hamp. 78 ; *Shaw v. Coster*, 2 Edw. Ch. 405. See *Nash v. Smith*, 6 Conn. 421. In *Parker v. Barker*, 42 N. Hamp. 89, Mr. Chief Justice Bell said : " The fact that, with the exception of the doubtful cases in Connecticut, no case of an interpleader bill has been maintained by a sheriff, in a case of this kind, though the occasion for them must have been always extremely frequent, is conclusive that redress and relief must have been sought and found elsewhere than in Courts of Equity. Besides, we think no community would have submitted to so tedious and expensive a method of settling the question, how money, coming into an officer's hands by levy of execution, should be disposed of."

² Mitf. Eq. Pl. by Jeremy, 142, 143 ; *Nicholson v. Knowles*, 5 Madd. 47 ; *Lowe v. Richardson*, 3 Madd. 277 ; *Story Eq. Jur.* § 814 – 820, and notes ; *Crawshay v. Thornton*, 7 Sim. 391. An interpleader between principal and agent is admissible only where the claim is under a derivative and not under an adverse title. *Crawshay v. Thornton*, 2 My. & Cr. 23 ; *Pearson v. Cardon*, 2 Russ. & My. 606, 607, 610.

³ *Dungey v. Angove*, 2 Sumner's Vesey, 304 ; *Johnson v. Atkinson*, 3 Anstr. 800 ; *Story Eq. Pl.* § 294 ; 2 *Story Eq. Jur.* § 812 ; *Clarke v. Byne*, 12 Ves. 383, 386 ; *White Water Valley Canal Co. v. Comegys*, 2 Carter (Ind.) 469.

⁴ *Smith v. Targett*, 2 Anst. 581 ; *Homan v. Moore*, 4 Price, 7 ; *Dungey v. Angove*, 2 Sumner's Vesey, 313, Mr. Hovenden's note (6) ; *Eden Injunct.* (2d Am. ed.) 398, 399 ; *Story Eq. Pl.* § 294 ; *Lowe v. Richardson*, 3 Madd. 277. See *Williams v. Halbert*, 7 B. Monroe, 184.

claim the same debt or duty. The rent due upon the demise to the tenant is a different demand from that which some other person may have upon the occupation of the premises.¹

But this general rule has exceptions; for instance, where the landlord has, by his own act, given color of title to another, subsequently to the lease, he may thereby have entangled the tenant in embarrassments, which a bill of interpleader may be the most proper mode of quieting.²

To support a bill of interpleader by a tenant, two persons must claim the same rent in privity of tenure, or of contract, as in the case of mortgagor and mortgagee, trustee and cestui que trust,³ lessor and his assignees subsequently to the lease,⁴ devisee and the heirs of the lessor.⁵

An insurance company was allowed to file a bill of interpleader against a landlord, who brought an action on the policy, and against the tenant, who filed a bill to have it laid out in rebuilding on the premises, and the plaintiffs' costs were paid out of the fund in Court.⁶

Where one rector claims a modus, and a rector of another parish claims tithes in kind of the same lands, they cannot be made to interplead.⁷

¹ *Dungey v. Angove*, 2 Sumner's Vesey, 310; Story Eq. Pl. § 194. So where a person is sued for the price of goods he has purchased, by one party, and for the value of the goods in trover, by another, he cannot compel the claimants to interplead. He must perform his bargain with the person of whom he has purchased, or show good cause why he does not. *Slaney v. Sidney*, 14 Mees. & W. 800. Besides, the claimants do not claim the same thing; the one seeks to have the benefit of a contract, the other claims the value of the chattel which is the subject-matter of it; the one claims the price agreed to be paid for the property sold, which may be ten times its value; while the other claims only its real value, in the shape of damages for its conversion. Parke B. in *Slaney v. Sidney*, *supra*.

² *Cowtan v. Williams*, 9 Sumner's Vesey, 107; *Clarke v. Byne*, 13 ib. 386; *East India Co. v. Edwards*, 18 ib. 378; *Hoggart v. Cutts*, 1 Cr. & Phil. 197, 205; 2 Story Eq. Jur. § 811–821; *Dungey v. Angove*, 3 Bro. C. C. (Perkins's ed.) 36, note (1); *Angell v. Hadden*, 16 Ves. 202; *Cook v. E. Rosslyn*, 1 Gif. 167, 170.

³ *Dungey v. Angove*, 2 Sumner's Vesey, 312; 1 Smith Ch. Pr. (2d Am. ed.) 479; Story Eq. Pl. § 294; *Hoggart v. Cutts*, 1 Cr. & Phil. 197, 205; 2 Story Eq. Jur. § 811–821; *Eden Injunct.* (2d Am. ed.) 399, 400; *White Water Valley Canal Co. v. Comegys*, 2 Carter (Ind.) 469.

⁴ *Cowtan v. Williams*, 2 Sumner's Vesey, 107; *Clark v. Byne*, 13 ib. 383.

⁵ *Badeau v. Tylee*, 1 Sandf. Ch. 270.

⁶ *Paris v. Gilham*, Cooper, 56.

⁷ *Woolaston v. Wright*, 3 Anst. 301.

If an estate is put up for sale at auction, and A becomes the purchaser and pays his deposit; and then, by order of the same owner, it is set up again for sale, and B becomes the purchaser and pays his deposit; such a case does not afford a proper ground for interpleader, if each demands his deposit from the stakeholder; for A and B do not claim in privity, and their deposits are distinct.¹

The plaintiff in a bill of interpleader must state his own rights and the several claims of the defendants, and pray that they may interplead so that the Court may adjudge to whom the thing in controversy belongs, and the plaintiff may be indemnified.²

The plaintiff should negative any interest in himself in the matter in controversy,³ and show, that he is a mere stakeholder,⁴ and that he is ignorant of the rights of the respective parties, who are called upon by him to interplead; or, at least, he must show, that there is some doubt to which of such parties the debt or duty belongs; so that he cannot safely pay or render it to one, without risk of being made liable for the same debt or duty to the other.⁵

The claims of the defendants should be specifically set forth, so that they may appear to be of the same nature and character, and the fit subject of a bill of interpleader.⁶

¹ *Hoggart v. Cutts*, 1 Cr. & Phil. 197, 205; Story Eq. Pl. § 294.

² Mitf. Eq. Pl. by Jeremy, 49, 141, 142; Story Eq. Pl. § 292.

³ Story Eq. Pl. § 292. But it is no objection to a bill of interpleader, that the plaintiff's chance of success, in litigating in respect to an interest in other property, not in the suit, and not now in litigation, might be increased by the success of one of the parties. *Openheim v. Leo Wolf*, 3 Sandf. Ch. 571. Still if the plaintiff has in any way lent himself to further the claims of either of the parties who claim the fund in controversy, or to aid one in obtaining the possession thereof, to the exclusion of the other, he cannot sustain his bill. *Marvin v. Elwood*, 11 Paige, 365; *Nash v. Smith*, 6 Conn. 421.

⁴ *Shaw v. Coster*, 8 Paige, 339; *Badeu v. Rogers*, 3 Paige, 209; Story Eq. Pl. 297; *Lincoln v. Rut. & Bur. R. R. Co.* 24 Vermont, 639; *Stuart v. Welch*, 4 M. & C. 305; *Bignold v. Audland*, 11 Sim. 23; *Moore v. Usher*, 7 Sim. 383; *Toulmin v. Reid*, 14 Beav. 499; *Diplock v. Hammond*, 2 S. & G. 141. The plaintiff cannot, after bill of interpleader filed, set up a right in himself to the fund in controversy. *Anderson v. Wilkinson*, 10 Sm. & Marsh. 601.

⁵ *Shaw v. Coster*, 8 Paige, 339; *Mohawk & Hudson R. R. Co. v. Clute*, 4 Paige, 384, 392; *Adams v. Dixon*, 19 Georgia, 513; *Farley v. Blood*, 10 Foster (N. H.) 360, 361; *Parker v. Barker*, 42 N. Hamp. 93.

⁶ Mitf. Eq. Pl. by Jeremy, 142, 143; Story Eq. Pl. § 293; *Hoggart v. Cutts*, 1 Cr. & Phil. 197, 205; 2 Story Eq. Jur. § 807 to 821. It is not incumbent upon, nor indeed is it proper for the plaintiff to state the respective cases of the inter-

If it appears from the bill, that one defendant is entitled to the debt or duty and that the other is not, both defendants may demur.¹ And so where it appears that neither of the defendants is entitled to the debt or duty.²

The plaintiff should always show a clear title in himself to maintain the bill; for otherwise the bill will be dismissed, however proper, in other respects, the case may be for an interpleader.³

The bill should also show, that there are proper persons in *esse*, capable of interpleading, and of setting up opposite claims; for otherwise the objects of the bill would be unattainable.⁴

The plaintiff should also admit a title against himself in each of the claimants, and that each of them claims a right, and such a right, as they may interplead for.⁵

If suits at law have been commenced against the plaintiff, he may pray that the claimants may be restrained from proceeding till the right be determined.⁶ But he cannot pray an injunction to stay proceedings in ejectment.⁷

pleading defendants; these must be stated by the defendants themselves in their answers, and they may also raise an objection to the suit on the ground, either that the case is not one proper for an interpleader bill, or that the plaintiff is acting in collusion with one of the defendants. *Statham v. Hall*, 1 T. & R. 30; *Toulmin v. Reid*, 14 Beav. 499. The plaintiff need not set out the facts on which the claims of the defendants are based, but it is sufficient to state the nature of their claims. *Shaw v. Coster*, 8 Paige, 339; *Lozier v. Van Saun*, 2 Green Ch. 325. For the form of a prayer in a bill of interpleader, see Story Eq. Pl. (3d ed.) § 297, in note.

¹ *Shaw v. Coster*, 8 Paige, 339; Mitf. Eq. Pl. by Jeremy, 142; Story Eq. Pl. § 292; *Mohawk & Hudson R. R. Co. v. Clute*, 4 Paige, 284; *Parker v. Barker*, 42 N. Hamp. 93. See the form of such demurrers, Willis, 440, 441.

² *Barker v. Swain*, 4 Jones Eq. (N. C.) 220. The bill must show that each of the defendants, whom it seeks to compel to interplead, claims a right, or they may both demur; and so, if the plaintiff shows no right to compel the defendants to interplead, whatever rights they may claim, each defendant may demur. Mitf. Eq. Pl. 58, 164, 165, 166.

³ Story Eq. Pl. § 292, 296; Mitf. Eq. Pl. by Jeremy, 142.

⁴ Story Eq. Pl. § 295; *Metcalf v. Hervey*, 1 Ves. 248, 249; 2 Story Eq. Jur. § 821; *Browning v. Watkins*, 10 Smedes & Marsh. 482.

⁵ 2 Story Eq. Jur. § 821; Story Eq. Pl. § 295; *Slingsby v. Boulton*, 1 Ves. & Bea. 334; *Atkinson v. Manks*, 1 Cowen, 691; *Quinn v. Green*, 1 Ired. Eq. 229; *Browning v. Watkins*, 10 Smedes & Marsh. 482. But the plaintiff need not show apparent title in defendants. *E. & W. I. Docks v. Littledale*, 7 Hare, 57. If one of two parties defendant withdraws all claim to the funds, a decree that they be paid to the other is of course. *Knight v. Yarborough*, 7 Smedes & Marsh. 179.

⁶ Mitf. Eq. by Jeremy, 49, 143; Story Eq. Pl. § 297.

⁷ *Metcalf v. Hervey*, 1 Ves. 248.

In a case where a sheriff was allowed to file a bill of interpleader, to settle the rights of property taken in execution, to which there were conflicting claims, an injunction to stay any suit against him in case of his selling the property, was refused on the ground, that the law provided him an ample remedy.¹

The fund in dispute must be brought into Court before the plaintiff can take any step in the cause.² But it has been held that the bill is not demurrable because the plaintiff does not offer to pay the money into Court.³

If the plaintiff does not pay the money into Court he should at least give bond and security for its ultimate payment, according to the decree.⁴

If the claim is for goods, it is not sufficient to bring the value of them into Court.⁵

Where land is the subject of the controversy, the plaintiff ought to make conveyances of the same ready for delivery to each of the claimants; and if he has not done so at the filing of the bill, and in the bill offered to deliver the deed to the party, who shall be decreed to be entitled, the Court will order such deeds to be made and filed in the case, subject to further order.⁶

If the plaintiff has paid over the money to one of the defendants on a claim of right, to which he was bound to submit, this will not preclude him from sustaining the bill.⁷

¹ *Storrs v. Payne*, 4 Hen. & Munf. 506.

² *Meux v. Bell*, 6 Sim. 175; *Mitf. Eq. Pl. by Jeremy*, 49, 143; *Story Eq. Pl.* § 291; *Mohawk & Hudson R. R. Co. v. Clute*, 4 Paige, 384; *Shaw v. Coster*, 8 Paige, 339; *City Bank v. Bangs*, 2 Paige, 570, 573; *Nash v. Smith*, 6 Conn. 421; *Atkinson v. Manks*, 1 Cowen, 691.

³ *Meux v. Bell*, 6 Sim. 175; 1 *Smith Ch. Pr.* (2d Am. ed.) 476; *Williams v. Wright*, 20 Texas, 499; *Nash v. Smith*, 6 Conn. 421. But see *Williams v. Walker*, 2 Rich. Eq. 291, in which it was held that the plaintiff should not only offer by his bill to bring the money or fund into Court, but he should obtain an order to that effect, and comply with it before proceeding in the cause. See also *Parker v. Barker*, 42 N. Hamp. 78, 96; *McGarnah v. Prather*, 1 Black. 299; *Shaw v. Coster*, 8 Paige, 339; 2 *Story Eq. Jur.* § 809, which support the ground that an offer to bring the money into Court is necessary. But, if the money must actually be paid into Court before any step is taken in the cause, the failure of an offer to bring it in must present merely a formal defect. See also *Mohawk & Hud. R. R. Co. v. Clute*, 4 Paige, 391. The bill should offer to pay interest on the demand when recoverable by law. *Bignold v. Audland*, 11 Sim. 23.

⁴ *Biggs v. Kouns*, 7 Dana, 411.

⁵ *Burnett v. Anderson*, 1 Mer. 405.

⁶ *Farley v. Blood*, 10 Foster (N. H.) 354.

⁷ *Nash v. Smith*, 6 Conn. 421; *Jew v. Wood*, 1 Cr. & Phil. 185.

Whenever the bill contains a prayer for an injunction, the money must be brought into Court before the Court will ordinarily act upon this part of the prayer.¹

The common order for an injunction, on a bill of this nature, is, that it issue upon the plaintiff paying the money into Court. This is a condition precedent, and an order for an injunction, not containing it, will be discharged. If the money cannot be paid in, in time to stay a trial, application should be made to the injunction officer, to vary the order on the special grounds.²

To a bill of interpleader, it is requisite that the plaintiff should make an affidavit "that this bill is not filed in collusion with either of the defendants in the said bill named, but merely of his own accord, for relief in this Honorable Court."³

The want of such an affidavit is a ground of demurrer.⁴

¹ Story Eq. Pl. § 297; *Mohawk & Hud. R. R. Co. v. Clute*, 4 Paige, 384, 391; *Richards v. Salter*, 6 John. Ch. 445; *Biggs v. Kouns*, 7 Dana, 410; *Dungey v. Angove*, 3 Bro. C. C. (Perkins's ed.) 36, 37, note (a); 2 Story Eq. Jur. § 809; *Fowler v. Lee*, 10 Gill & John. 358; *Eden Injunct.* (2d Am. ed.) 403; *Sieveking v. Behrens*, 2 My. & Cr. 581; *Pauli v. Von Melle*, 8 Sim. 327; *Meux v. Bell*, 6 Sim. 175; *Shaw v. Chester*, 2 Edw. Ch. 405.

² *Sieveking v. Behrens*, 2 My. & Cr. 581.

³ 1 Smith Ch. Pr. (2d Am. ed.) 474; *Eden Injunct.* (2d. Am. ed.) 401; *Shaw v. Coster*, 8 Paige, 339; 2 Hoff. Ch. Pr. 103; *Tobin v. Wilson*, 3 J. J. Marsh. 67; *Biggs v. Kouns*, 7 Dana, 411; *Mitf. Eq. Pl.* by Jeremy, 143; *Atkinson v. Manks*, 1 Cowen, 691; *Story Eq. Pl.* § 291, 297; *Stevenson v. Anderson*, 2 Ves. & B. 410; *Dungey v. Angove*, 2 Sumner's Vesey, 313, Mr. Hovenden's note (5); 2 Story Eq. Jur. § 809; *Farley v. Blood*, 10 Foster (N. H.) 354, 361, 362; *Wood v. Lyne*, 4 De G. & Sm. 16. Where the plaintiff was abroad, and the case pressing, leave was granted to his solicitor to make the affidavit. *Larabie v. Brown*, 1 D. & J. 204; S. C. 5 W. Rep. 538; 23 Beav. 607. If the affidavit is made in behalf of a company by the registered officer thereof, he should state, that, to the best of his belief, the company does not collude. *Bigbold v. Audland*, 11 Sim. 23. It is not required on a bill by the owner of an estate subject to a charge claimed conflictingly. *Vyvyan v. Vyvyan*, 5 L. T. N. S. 511; 2 Seton Dec. (3d Eng. ed.) 963.

As to such affidavit, see *Braith.* 27; and for its form, by sole plaintiff, *ib.* 356; by some or one of several copartners, *ib.* 369; by a public officer of a company, *ib.*; and by plaintiff's solicitor, plaintiff being out of jurisdiction, *ib.* 370; *Wood v. Lyne*, 4 De G. & Sm. 16; *Larabie v. Brown*, 14 Beav. 499.

⁴ *Mitford Eq. Pl.* by Jeremy, 143; *Metcalfe v. Hervey*, 1 Ves. 248; *Tobin v. Wilson*, 3 J. J. Marsh. 67; *Farley v. Blood*, 10 Foster (N. H.) 354; *Shaw v. Chester*, 2 Edw. Ch. 405; *Gibson v. Goldthwaite*, 7 Ala. 281. See the form of demurrer for want of such an affidavit, *Willis*, 442; 2 Eq. Drafts, (2d ed.) 77. An objection to the form of the affidavit should be made by demurrer. *Hamilton v. Marks*, 5 D. & S. 638; *Wood v. Lyne*, 4 D. & S. 16.

Where the bill is filed by the officer of a company, on behalf of the company, the affidavit annexed ought to state, not that the plaintiff does not collude, but that to the best of his knowledge and belief, the company do not collude with the defendants.¹

But by the practice in Connecticut it is not necessary to annex this affidavit of non-collusion.²

Collusion will not be presumed against this affidavit, nor can a counter affidavit prevail against it.³

But where there is a suspicion of collusion, the Court will direct an inquiry into the circumstances.⁴

The plaintiff need not swear that the bill is filed at his own expense.⁵ Nor that it was filed without the knowledge of either of the defendants.⁶

The bill may be either made an exhibit, and be referred to by the affidavit, or the affidavit may be annexed to it. If made an exhibit, the Master indorses on the back of it, "This parchment writing was produced and shown to A. B., and is the same referred to in his affidavit, sworn, the — day of —." If the bill is not exhibited, but the affidavit is annexed to it, the words of the affidavit then should be "that the bill hereunto annexed," instead of "this bill." The affidavit is filed with the bill.⁷

The interpleading plaintiff, immediately on filing his bill, accompanied by the affidavit of non-collusion, may, without waiting for the appearance of the defendants, and even before a subpœna has been served, move *ex parte* for an injunction to restrain proceedings at law commenced against him, offering to pay the money in dispute into court.⁸

¹ Bignold v. Audland, 11 Sim. 23.

² Nash v. Smith, 6 Conn. 421. See Jerome v. Jerome, 5 Conn. 352. The practice of Courts of Chancery in Connecticut regarding bills of interpleader, differs in this and other respects, from that of England and of many of the other United States. Consociated Pres. So. of Green's Farms v. Staples, 23 Conn. 544.

³ Langston v. Boylston, 2 Sumner's Vesey, 101.

⁴ Dungey v. Angove, 2 Ves. jr. 304; Eden Injunct. (2d Am. ed.) 401. See Satham v. Hall, 1 T. & R. 30; Toulmin v. Reid, 14 Beav. 499.

⁵ Metcalf v. Hervey, 1 Ves. 248; Eden Injunct. (2d Am. ed.) 401.

⁶ Stevenson v. Anderson, 2 Ves. & Bea. 410; Dungey v. Angove, 2 Sumner's Vesey, 313, Mr. Hovenden's note (5).

⁷ 1 Smith Ch. Pr. (2d Am. ed.) 474. It is not necessary that the affidavit should be fastened to the bill; it is enough if it is filed with the bill. Jones v. Shepherd, 29 Beav. 293.

⁸ 1 Smith Ch. Pr. (2d Am. ed.) 474.

If the defendant has appeared, he is served with a notice of motion.¹

It appears to have been the practice to read an affidavit of the facts on the motion for an injunction.² But this is not now required.³

In *Croggon v. Symons*,⁴ the Vice-Chancellor refused to grant an injunction at once to stay proceedings at law in an interpleading suit, and assimilated it to the common injunction. But this is not the practice.⁵

The plaintiff in a bill of interpleader moves at once upon a notice of motion for a special injunction on the payment of the money into court, without first obtaining the common injunction, as in other cases where actions at law are restrained.⁶ And the injunction not only restrains execution, but also trial, and all other proceedings.⁷

In *Philling v. Edwards*,⁸ the injunction was granted, although the trial was coming on the next day.⁹

A bill of this character will lie, although all but one of the defendants claiming the subject in controversy are out of the jurisdiction; otherwise, by fraudulently absenting themselves, they might prevent the other claimant from obtaining justice. If the answers of the absent defendants are not put in within a reasonable time a perpetual injunction will be awarded against them.¹⁰ In a case

¹ 1 Smith Ch. Pr. (2d Am. ed.) 474.

² *Langston v. Boylston*, 2 Ves. jr. 101; *Dungey v. Angove*, 2 Sumner's Vesey, 313, Mr. Hovenden's note (2).

³ 1 Smith Ch. Pr. (2d Am. ed.) 474; *Walbanke v. Sparks*, 1 Sim. 385.

⁴ 3 Madd. 130.

⁵ 1 Smith Ch. Pr. (2d Am. ed.) 474, 475; *Dungey v. Angove*, 2 Sumner's Vesey, 313, Mr. Hovenden's note (2); *Hamilton v. Marks*, 5 D. & G. 638; *Jones v. Gilman*, Coop. 49. See *Eden Injunct.* (2d Am. ed.) 401 to 403.

⁶ *Vicary v. Widger*, 1 Sim. 15; *Warrington v. Wheatstone*, 1 Jacob, 205.

⁷ *Warrington v. Wheatstone*, 1 Jacob, 205.

⁸ Cited 1 Smith Ch. Pr. (2d Am. ed.) 475.

⁹ 1 Smith Ch. P. (2d Am. ed.) 475.

¹⁰ *Martinius v. Helmuth, Cooper*, 248; *Stevenson v. Anderson*, 2 Ves. & Bea. 112; *Eden Injunct.* (2d. Am. ed.) 404, 405. See *Richards v. Salter*, 6 John. Ch. 445. It is irregular for the Court to direct any inquiries as to the conflicting claims of the defendants, until the answers of all the defendants are filed. *Masterman v. Lewin*, 2 Ph. 182.

The ordinary practice appears to be, for the plaintiff, upon getting in all of the answers, to bring the cause to a hearing, when the Court will make such a decree or order as may be necessary to enable the Court to decide the question in dis-

where the subject was a policy on a cargo lost, an injunction was granted in an interpleading suit to stay proceedings at law, although both defendants resided abroad.¹ *A fortiori*, when a party has once appeared, he cannot, by subsequently absenting himself, prevent a decree.²

And after an answer has been put in by one of the defendants, should there be any improper delay in getting in the answers of the others, that will afford a special ground, upon which the party, who has answered, may move to have the money paid out to him, if it has been brought into Court.³

If one of the defendants does not appear, the bill may be taken as confessed as to him.⁴

Where a defendant suffers a bill to be taken as confessed against him, it is an admission, that, as to him, the bill was properly filed, and that he has made an improper claim against the fund.⁵

If one of the defendants is not personally served with process, being absent, and the bill is taken as confessed against him, the defendant who appears will not be entitled to the possession of the fund, until the expiration of the time limited by the statute for the other defendant to appear, unless he gives security to replace the fund, in case the other defendant appears and establishes his right to the same.⁶

Whenever the objection to a bill of this kind appears upon its face, advantage should be taken of it by demurrer. For if the defendants, instead of demurring, put in answers insisting, that the bill is improperly filed, they will only be allowed, upon the dismissal of the bill, the costs to which they would have been entitled upon the allowance of a demurrer.⁷

pute between the defendants. *Angell v. Hadden*, 16 Ves. 202; *Townley v. Deane*, 3 Beav. 213; *Meux v. Bell*, 1 Hare, 73.

¹ *Mantinius v. Helmuth*, Cooper, 245.

² *Farebrother v. Prattent*, 5 Price, 305.

³ *Hyde v. Warren*, 19 Ves. 323; *Dungey v. Angove*, 2 Sumner's Vesey, 313, Mr Hovenden's note (4). See *Richards v. Salter*, 6 John. Ch. 445.

⁴ *Farebrother v. Prattent*, 1 Daniel Rep. 64; *Farley v. Blood*, 10 Foster (N. H.) 364, 365; *Richards v. Salter*, 6 John. Ch. 445. The decree for an interpleader will be as effectual as to those defendants who were duly served with process, and who have not appeared or made answer to the bill, as to those who are before the Court. *Hodges v. Smith*, 1 Cox, 357; 1 Madd. Ch. Pr. 177; *Farley v. Blood*, *supra*.

⁵ *Badeau v. Rogers*, 2 Paige, 209.

⁶ *Aymer v. Gault*, 2 Paige, 284.

⁷ *Shaw v. Coster*, 8 Paige, 339.

The defendants may put in answers admitting or denying the facts stated in the bill. If the defendants, or either of them, deny the allegations in a bill of this nature, or set up distinct facts in bar of the suit, the plaintiff must reply to the answer, and close the proofs, in the usual manner, before he can bring his cause to a hearing.¹

Where the plaintiffs had replied to the answers, and served subpoenas to rejoin, it was held, that they could not move to have their costs paid out of the fund in Court, but must set down the cause for hearing.²

But where the defendant admits the facts stated in the bill, and in which the right to file a bill of interpleader rests, and set up no new facts as against the plaintiff, or in bar of his suit, it seems to be sufficient for him to file a replication, and to set the cause down for a decree to interplead, without waiting till the proofs are taken as between the defendants.³

A decree that a bill of interpleader is properly filed is the only decree, that the plaintiff is interested in obtaining.⁴

The amount or origin of the fund &c., is not the object of inquiry as against the plaintiff, except in reference to fraud or collusion on his part.⁵ But the amount and origin of the fund may be material, as between those called upon to interplead.⁶

Where the decree goes on to order a reference to a Master by

¹ *City Bank v. Bangs*, 2 Paige, 570; *Jones v. Gilham*, 1 Cooper, 49. But the defendants need not before this hearing enter into evidence as against each other. *Thames &c. Co. v. Nash*, 5 Sim. 280; *Catherall v. Davies*, 1 Gif. 326.

² *Jones v. Gilham*, 1 Cooper, 49; *Eden Injunct.* (2d Am. ed.) 404.

³ *City Bank v. Bangs*, 2 Paige, 570. See *The Thames and Med. Canal Co. v. Nash*, 5 Sim. 280; *Leonard v. Jamison*, 2 Edw. Ch. 136. Where it appears, by the answers to a bill of interpleader, that each defendant has claimed the fund in dispute, no further proof of the fact is necessary to entitle the plaintiff to a decree. *Balchen v. Crawford*, 1 Sandf. Ch. 380.

⁴ *Story Eq. Pl. § 297 (b)*; *Atkinson v. Manks*, 1 Cowen, 691. The only question at the hearing is, whether the defendants should interplead. *Catherall v. Davies*, 1 Gif. 326. Sometimes, however, the Court directs that an action already commenced may be proceeded in. 2 *Seton Dec.* (3d Eng. ed.) 964, 967; *Aldridge v. Menser*, 6 Ves. 418. Where one of the defendants in a bill of interpleader, by his answer, made a claim against the plaintiff beyond the amount admitted to be due, and beyond that which was admitted by the other defendants, it was held that he must be permitted to proceed at law to establish that part of his demand not in controversy with the other defendants. *City Bank v. Bangs*, 2 Paige, 570.

⁵ *Atkinson v. Manks*, 1 Cowen, 691.

⁶ *Ibid.*

consent of parties, upon principles calculated to adjust the rights of those called upon to interplead, it will be considered a substitute for the ordinary proceeding by actual interpleader.¹

If the bill is dismissed, there can be no further proceedings by consent, as between the defendants, for the Court has no jurisdiction.²

A decree in an interpleading suit may terminate the case as to the plaintiff, though the litigation may continue between the defendants by interpleader, and in that case, the cause may proceed without revivor, notwithstanding the death of the plaintiff.³

Courts of Equity dispose of questions arising upon bills of interpleader in various modes, according to the nature of the question, and the manner in which it is brought before the Court. An interpleading bill is considered as putting the defendants to contest their respective claims, just as a bill does, which is brought by an executor or trustee to obtain the direction of the Court, upon the adverse claims of different defendants. If, therefore, at the hearing, the question between the defendants is ripe for a decision, the Court will decide it, and make a final decree at the first hearing. And if it is not ripe for a decision as between the defendants, the Court merely decides that the bill is properly filed, and dismisses the plaintiff with his costs up to that time, and directs an action, or an issue, or a reference to a Master, to ascertain contested facts, as may be best suited to the nature of the case.⁴

¹ *Atkinson v. Manks*, 1 Cowen, 691.

² *Jennings v. Nugent*, 1 Moll. 134.

³ *Mitf. Eq. Pl. by Jeremy*, 60, 49, note (n); *Anon.* 1 Vern. 351; *Jennings v. Nugent*, 1 Moll. 134.

⁴ *Angell v. Hadden*, 16 Vesey 202; *City Bank v. Bangs*, 2 Paige, 570; 2 Story Eq. Jur. § 822; 1 Smith Ch. Pr. (2d Am. ed.) 472; *Eden Injunct.* (2d Am. ed.) 404; *Horton v. Baptist Church & Soc. in Chester*, 34 Vermont, 317; *Hodges v. Smith*, 1 Cox, 351; *Townley v. Deare*, 3 Beav. 213; *Bolton v. Williams*, 4 Bro. C. C. 297; *Farley v. Blood*, 10 Foster (N. H.) 354, 365, 366. Under a judgment ordering certain parties to interplead, such other parties may be joined as, from their interest in the litigated property, are necessary to its proper determination. *Leavitt v. Fisher*, 4 Duer (N. Y.) 1.

The parties defendants in a bill of interpleader stand before the Court to litigate the questions of right pending between them, to the same extent as if one had brought a bill against the other alleging the same matter and for the same purpose. *Horton v. Baptist Church & So. in Chester*, 34 Vermont, 317. They may compromise the controversy and so end the suit; or they may agree a state of facts upon which the Court may make a decree without regard to the plaintiff in the interpleading suit. *Ib.*

An issue or a direction to interplead *at law* would be obviously improper in all cases, except those where the titles on each side are purely legal. Equitable titles can only be disposed of by Courts of Equity; and even as to legal titles, it is obvious, that in many cases a resort to an issue, or to an interpleader, to be had at law, would be unnecessary, or inexpedient.¹

If, after answer by both defendants, one makes default at the hearing, the Court will make a decree on hearing the case of the defendant who appears.²

On a reference to the Master to settle the rights of the defendants to an interpleading suit as between themselves, the Court will give the benefit of a discovery as against each other, if they, or either of them, desire it.³

Two defendants may read the answers of each other at the hearing,⁴ and are allowed in costs for a copy of each other's answer.⁵

It appears, by the case of *Armiter v. Swanton*, as reported in 1 Ambler, 393, that in a bill by trustees in the nature of a bill of interpleader, the Court gave leave to one of the defendants to examine one of the plaintiffs as a witness.⁶ But Mr. Blunt in a note to this case in his edition of Ambler seems to think, that there is a mistake in the report both as to the name of this case and as to the application and point decided.⁷

Where the plaintiff has brought a bill of interpleader, properly and in good faith, as against both the defendants,⁸ he will be entitled to his costs both in equity, and at law, where he has been sued, out of the funds⁹ in his hands, when there are any such

¹ 2 Story Eq. Jur. § 822.

² *Hodges v. Smith*, 1 Cox, 357.

³ *City Bank v. Bangs*, 2 Paige, 570.

⁴ 1 Smith Ch. Pr. (2d Am. ed.) 457; *Bowyer v. Pritchard*, 11 Price, 103.

⁵ *Ibid.*

⁶ See Smith Ch. Pr. (2d Am. ed.) 475.

⁷ See 1 Blunt's Ambler, 393, note (1). As to the right of a defendant to examine a plaintiff as a witness in ordinary cases, see *ib.* note (2), and cases cited; ante, 885, note.

⁸ *Badeau v. Rogers*, 2 Paige, 209.

⁹ *Richards v. Salter*, 6 John. Ch. 445; *Canfield v. Sterling*, 1 Hopk. 224; *Aymer v. Gault*, 2 Paige, 284; *Spring v. South Carolina Ins. Co.* 8 Wheat. 268; *Mason v. Hamilton*, 5 Sim. 19; *Atkinson v. Manks*, 1 Cowen, 691; *Campbell v. Solomons*, 1 Sim. & Stu. 462; *Thompson v. Ebbets*, 1 Hopk. 272; *Paris v. Gilham*, 1 Cooper, 56; *Aldridge v. Mesner*, 6 Vesey, 418; *Aldridge v. Thompson*, 2 Bro. C. C. (Perkins's ed.) 150, and note (a); *City Bank v. Bangs*, 2 Paige, 570. Where the right to compel the defendants to interplead is not disputed, it seems

which can be made available, or against some of the parties made defendants in the bill.¹ It is otherwise, where the bill is unnecessarily filed.²

The plaintiff has a *lien* for his costs on the fund in Court, if there be such a fund; but if there be no such fund, then costs will be given against the party, who occasioned the necessity for the suit. This was so held in a case, which, though not strictly one of interpleader, was in the nature of an interpleading bill.³

In the adjustment of the controversy between the defendants, the party whose claim is adjudged groundless, will be compelled to pay the costs, which have been taken in the first instance from the fund, to the rightful claimant of the fund.⁴

Costs may be given as between the defendants to an interpleading bill.⁵ The direction in such case is, that the plaintiff shall be at liberty to retain his costs out of the fund; to pay the remainder that the plaintiff may obtain his costs on motion. *Jones v. Gilman*, Coop. 49; Where the right is disputed, costs will not be given to the plaintiff before the hearing. *Jones v. Gilman*, *supra*.

¹ *Farley v. Blood*, 10 Foster (N. H.) 374, 375.

² *Bedell v. Hoffman*, 2 Paige, 199; *Badeau v. Rogers*, ib. 209; *Shaw v. Coster*, 8 Paige, 339; *Crawford v. Fisher*, 1 Hare, 436. If the plaintiff improperly conduct himself, he will not be entitled to his costs. *Brymer v. Buchanan*, 1 Cox, 425, note.

³ *Aldridge v. Mesner*, 6 Sumner's Vesey, 418, 419. See *Dunlop v. Hubbard*, 19 ib. 205, Mr. Hovenden's note; *Eden Injunct.* (2d Am. ed.) 405; *Beames Costs*, 37; *Campbell v. Solomons*, 1 Sim. & Stu. 462; *Paris v. Gilham*, Coop. 56; *Farley v. Blood*, 10 Foster (N. H.) 374, and cases cited.

⁴ *Thompson v. Ebbets*, 1 Hopk. 272; *Canfield v. Sterling*, ib. 224; *Mason v. Hamilton*, 5 Sim. 19; *Badeau v. Rogers*, 2 Paige, 209; *Aldridge v. Mesner*, 6 Vesey, 418; *Dowson v. Harcastle*, 1 Sumner's Vesey, 368, 369; S. C. 2 Cox, 278; *Cowtan v. Williams*, 9 Vesey, 108. In *Edenson v. Roberts*, 2 Cox, 281, the plaintiff was ordered to pay the costs of some of the defendants and to be repaid them by others. But the plaintiff must pay the costs of his proceedings by which needless expense is incurred. *Crawford v. Fisher*, 1 Hare, 436.

⁵ *Cowtan v. Williams*, 9 Sumner's Vesey, 107, 108; *Brymer v. Buchanan*, cited ib.; *Dowson v. Harcastle*, 2 Cox, 279; S. C. 1 Sumner's Vesey, 368; *Eden Injunct.* (2d Am. ed.) 405, 406, and note. On further directions, the Court will order the defendants, by whom the suit has been occasioned, to pay the costs of the plaintiff and of the other defendants. *Dowson v. Harcastle*, 2 Cox, 278; *Cowtan v. Williams*, *supra*; *Farley v. Blood*, 10 Foster (N. H.) 374; though they afterwards withdraw their claim. *Mason v. Hamilton*, 5 Sim. 19. Though a bill is dismissed, as not properly relating to a case of interpleader, it will sometimes be so without costs, in regard to defendants whose conduct occasioned the suit. *Cochrane v. O'Brien*, 2 J. & Lat. 380; *Glynn v. Locke*, 3 Dr. & W. 11.

to the defendant in favor of whom the decree is made ; and that the unsuccessful defendant should pay to the other defendant what should be so retained by the plaintiff, and the costs of that defendant.¹

Costs may be given to a defendant in a suit, which, though not strictly one of interpleader, was in the nature of an interpleading bill.²

If one of the defendants suffers the bill to be taken as confessed against him, he will be personally charged with all the costs, which have accrued in consequence of his unjust claim upon the fund.³

Under special circumstances the defendants will be allowed their costs respectively out of the fund.⁴

If the defendants, in a proper case for demurring, put in answers insisting that the bill is improperly filed, they will be allowed, on a dismissal of the bill, only the costs, to which they would have been entitled, upon the allowance of a demurrer.⁵

Costs are generally given as between party and party.⁶

But in *Dungey v. Angove*,⁷ which was a case of fraudulent collusion, the plaintiff and his solicitor were ordered to pay the defendant to a bill of interpleader, which was dismissed, *all* his expenses as between attorney and client.

The remedy by bill of interpleader, although it has cured many defects in proceedings at law, has yet left many cases of hardship unprovided for. No attempt appears to have been made in America to remedy these grievances. But in England, by 1 & 2 Will. 4, cap. 58, a far more expanded reach has been given to the remedy of interpleader in the Courts of Law, and its benefits have been extended to many cases of honest, but unavoidably doubtful litigation.⁸ The jurisdiction in Equity seems, however, to have been left substantially upon its old foundations.⁹

Although a bill of interpleader, strictly so called, lies only, where the party applying claims no interest in the subject-matter ; yet there are many cases, where a bill in the nature of a bill of

¹ Eden Injunct. (2d Am. ed.) 406.

² *Dunlop v. Hubbard*, 19 Sumner's Vesey, 205.

³ *Badeau v. Rogers*, 2 Paige, 209.

⁴ *Atkinson v. Manks*, 1 Cowen, 691.

⁵ *Shaw v. Coster*, 8 Paige, 339.

⁶ *Dunlop v. Hubbard*, 19 Vesey, 205 ; *Dowson v. Harcastle*, 2 Cox, 279.

⁷ 2 Vesey jr. 818.

⁸ 1 Smith Ch. Pr. (2d Am. ed.) 476 ; 2 Story Eq. Jur. § 823.

⁹ 2 Story Eq. Jur. § 823.

interpleader, will lie by a party in interest, to ascertain and establish his own rights, where there are other conflicting rights between third persons. As, for instance, if a plaintiff is entitled to equitable relief against the owner of property, and the legal title thereto is in dispute between two or more persons, so that he cannot ascertain to which it actually belongs, he may file a bill against the several claimants in the nature of a bill of interpleader for relief.¹

So a vendee of personal property may file a bill in the nature of an interpleader, against his vendor and a third person, who claims the property, and pray a decree upon their claims, that he may be secure in the payment of the purchase-money.²

In such cases the plaintiff seeks relief for himself, whereas in an interpleading bill strictly so called, the plaintiff only asks, that he may be at liberty to pay the money, or deliver the property to the party, to whom it of right belongs, and may, thereafter, be protected against the claims of both.³

Where one of the defendants in a bill of interpleader in his answer makes a claim against the plaintiff beyond the amount admitted to be due and paid into Court, and which is not claimed by the other defendants, he will be permitted to proceed at law to establish his right to that part of his demand, which is not in controversy with the other defendants.⁴

The duty of a plaintiff in a bill in the nature of a bill of interpleader which is brought by an executor or trustee to obtain the direction of the Court as to the disposition of a fund in his hands, is performed when he has brought the parties in interest before the Court, and he is not entitled to take part in the argument of the questions involved.⁵

¹ *Mohawk & Hud. R. R. Co. v. Clute*, 4 Paige, 384; *Thomson v. Ebbets*, 1 Hopk. 272; *Parks v. Jackson*, 11 Wend. 443; *Bedell v. Hoffman*, 2 Paige, 199; *Mitchell v. Hayne*, 2 Sim. & Stu. 63; *Goodrich v. Shotbolt*, Prec. Ch. 333 to 336; *City Bank v. Bangs*, 2 Paige, 579; *Fowler v. Lee*, 19 Gill & John. 358.

² *Darden v. Burns*, 6 Ala. 362.

³ 2 Story Eq. Jur. § 824; Story Eq. Pl. § 297 *b*.

⁴ *City Bank v. Bangs*, 2 Paige, 570.

⁵ *Houghton v. Kendall*, 7 Allen, 72. By a rule of the Supreme Judicial Court of Massachusetts, "in bills by executors and parties to obtain the instructions of the Court, and in bills of interpleader, or in the nature of interpleader, no solicitor or counsel for the plaintiff shall appear or be heard or act for and in behalf of any or either of the defendants." 7 Allen, 73, note.

CHAPTER XXXVI.

OF AFFIDAVITS.

HAVING, in pursuance of the original arrangement of the present Treatise, conducted the reader through a suit in Chancery in all its ordinary stages, from the bill to the final decree, and having directed his attention to the practice arising in consequence of those incidental occurrences by which a suit may become defective or abated, the author proposes now, in further prosecution of his plan, to direct the practitioner's attention to those applications which may be made to the Court in the progress of a cause for the purpose of obtaining from it orders not immediately necessary to the regular progress of the suit, but for which a necessity arises from some collateral matter consequent upon the pleadings or process or other circumstances of the case. Applications of this nature are usually termed interlocutory applications, and the investigation of the rules which govern the Court in granting them, will form the subject of some of the following chapters: but it frequently happens that applications of this nature are supported by evidence, not elicited by interrogatories in the ordinary manner of taking evidence in the Court, but offered to the Court in the form of a written declaration, either by a party making the application, or a stranger, (which form of evidence has frequently been alluded to in the present Treatise,) the writer conceives that before he enters into the consideration of interlocutory applications in general, it will not be considered out of its place here, if he devotes a few pages to the discussion of the rules by which the practice relating to affidavits is regulated.

An affidavit then is a declaration upon oath or affirmation,¹ be-

¹ A person professing to be a Quaker or Moravian may make affidavit upon solemn affirmation, see 7 & 8 Will. III. c. 34; 3 & 4 Will. IV. c. 49; which privilege has since been extended by 1 & 2 Vict. c. 77, to persons who, having been Quakers or Moravians, have ceased to belong to such sects, but continue to have conscientious objections to the taking of an oath. Where the affidavit is on affirmation, and the person taking it does not certify that the affirmant is a Quaker or other person allowed by law to make affirmation, the affidavit can be of no avail. *Ringgold v. Jones*, 1 Bland, 90.

fore some persons having competent and lawful power and authority to administer the same.¹

It was necessary, until the Order of 1842, that all affidavits made within ten miles of Lincoln's Inn Hall, should be sworn before a Master in ordinary,² either at the public office, or at the Master's chambers: or if out of the usual office hours, at a Master's private residence;³ but now the 7th Order of October, 1842, without superseding the jurisdiction of the Master, has directed, "That pleas, answers, affidavits or affirmations, whereon to ground process of contempt, affidavits or affirmations required to be annexed to bills, and oaths or affirmations as to the carriage of pleas, answers, examinations, or depositions of witnesses taken before Commissioners in the country, may be sworn, affirmed, or attested upon honor, however, before the Clerk of Records and Writs, or before the Clerk of Enrolments in Chancery, as occasion may require, for the better despatch of business."

With respect to affidavits taken in the country, the 33d Order of 1833, directs, "that the Masters extraordinary of this Court, shall be at liberty in future to take any affidavit, or do any other act incident to the office of Master extraordinary in Chancery, at any place which is distant not less than ten miles from the Hall in Lincoln's Inn, any existing Order to the contrary notwithstanding."

It is to be observed, also, that the Master extraordinary, before whom the affidavit is sworn, must not be a solicitor in the cause,⁴

¹ Hind. 451. In *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601, it was held that an affidavit in Chancery, not sworn before a Judge of the Court, or a commissioner appointed to administer an oath, could not be received in evidence. An affidavit in New York may be sworn to before a State senator, he being *ex officio* a Judge of the Court for the Correction of Errors, which is a Court of record. *Craig v. Briggs*, 4 Paige, 548. An affidavit taken before a commissioner of deeds *de facto*, for a city, who is exercising such office under color of an appointment by the Governor and Senate, may be read in a suit between other persons; and the Court will not inquire collaterally into the legality of such appointment. *Parker v. Baker*, 8 Paige, 428. Where nothing appears to show that an affidavit, was taken out of the jurisdiction of the officer before whom it was sworn, it will be presumed to have been taken within the limits of his jurisdiction. *Ib.*

² The Taxing Master has also jurisdiction to take affidavits in matters relating to costs, ante, p. 1514, 9th Order of October, 1842.

³ Hind. 451.

⁴ But this rule is confined in New York to the solicitor on record. An affidavit may be sworn to before any proper officer, although he is counsel for one of the

and that, in a case before Lord Hardwicke, where the affidavits, in support of a petition, had been sworn before the petitioner's solicitor, the petition was dismissed, and the costs were directed to come out of the solicitor's pocket.¹ And in the case of *Wood v. Harpur*,² Lord Langdale, M. R., rejected affidavits, because they had been sworn before a Master extraordinary, who acted as clerk to the plaintiff's attorney.

And by stat. 1 Will. IV. c. 36, s. 15, rule 20, it is provided, that, "In order to relieve persons in prison from the expense of a Master's attendance to take affidavits or answers, the Lord High Chancellor shall, by one or more commission or commissions under the Great Seal, under or in respect of which no fee shall be payable, nominate and appoint the warden or keeper or other chief officer of any prison or prisons which the City of London or the bills of mortality, and their deputies, to the Master extraordinary of the High Court of Chancery, for the purpose of taking and receiving such affidavits and answers as any person or persons within such prison or prisons shall be willing or desirous to make and for no other purpose"; and it is further provided, "That the person so taking such affidavit or answer, shall, in respect thereof, be entitled to receive a fee of one shilling and no more."

Moreover, the Court of Chancery is in the habit of receiving affidavits made by parties resident out of the jurisdiction, though necessarily not sworn to before any of those functionaries, provided it is shown that the persons before whom they are sworn are persons who, by the law of the country in which the affidavit is sworn, are authorized to administer an oath;³ thus an affidavit sworn before a Master in ordinary or a Master extraordinary of

parties, or is a partner of the solicitor in the cause. *The People v. Spalding*, 2 Paige, 326. The provision of the Revised Statutes of New York, prohibiting a Master from acting as such in a cause, in which he is counsel, does not extend to the mere taking of an affidavit. *Ib.*; *McLaren v. Charrier*, 5 Paige, 530.

¹ *In re Hogan*, 3 Atk. 812.

² 3 Beav. 290.

³ An affidavit taken before a Master of the Court of Chancery in New Jersey, at a place out of the State, will not be allowed to be read in that Court; the Master has no authority to take an affidavit out of the State. *Lambert v. Maris*, Halst. Dig. 173. But an affidavit sworn to before a Master in Chancery in another State, who was not a commissioner appointed by the State where the affidavit was offered, was held regular in *Allen v. State Bank*, 1 Dev. & Bat. 7. In *Ramy v. Kirk*, 9 Dana, 267, an affidavit made out of the State was held not admissible.

the Court of Chancery in Ireland has been permitted to be read in this Court.¹ So, also, has an affidavit sworn before a Baron of the Exchequer in Scotland.² It should be mentioned here, that in *Hyde v. Whitfield*,³ Lord Eldon is reported to have said, that although the Courts have, of late, acted upon affidavits made before the Superior Courts in Scotland, he did not recollect an instance of the Court taking notice of an affidavit sworn before a Justice of the Peace in Scotland. It appears, however, that his Lordship's memory in that case was not quite accurate, for, in *Pinkerton v. The Barnsley Canal Company*,⁴ he made an order, upon an application which was opposed, that the Master should, in a matter pending before him, be at liberty to receive an affidavit sworn before a Justice of the Peace in Scotland, upon its being verified to the satisfaction of the said Master, that the person before whom the affidavit purported to have been made was, according to the laws of Scotland, qualified to administer an oath, and upon the signature of such person to the *jurat* of the affidavit being verified.⁵ Upon the authority of this case, Lord Chief Baron Alexander permitted an affidavit, sworn by a defendant before a magistrate in Scotland, to be read upon a motion in the Court of Exchequer, and it may be assumed that the Court of Chancery would be guided by the same precedent.⁶

The directions contained in Lord Eldon's order in *Pinkerton v. The Barnsley Canal Company*,⁷ point out very clearly the terms upon which the Court will receive an affidavit sworn out of the jurisdiction of the Court, viz., *that it should be shown that the person before whom the affidavit purports to have been sworn, is, according to the law of the country in which it is sworn, qualified to administer an oath, and that the signature of such person should be properly verified.*

Upon this principle the Court acted in *Chicot v. Lequesne*,⁸ in

¹ *Sergison v. Sergison*, cited 1 J. & W. 296; and *Annesley v. Earl of Anglesey*, 1 Dick. 90.

² *Braham v. Bowes*, 1 J. & W. 296.

³ 19 Ves. 344.

⁴ 3 Y. & J. 277, *notis.*

⁵ See *Ramy v. Kirk*, 9 Dana, 267, as to an affidavit sworn to before a Justice of the Peace of another State.

⁶ *Ellis v. Sinclair*, 3 Y. & J. 273.

⁷ *Ubi supra.*

⁸ 1 Dick. 150.

which it ordered an affidavit as to the production of books by a party resident in Holland, to be sworn before a notary public at Amsterdam, with the intervention of a proper magistrate, if necessary by the law of Holland, to the administration of the oath.

The object in requiring the affidavit, in the above case, to be sworn before a notary public, was to enable the notary to verify the transaction under his official seal,¹ “for, as by the law of nations a notary public has credit everywhere, the Court will give credit to him.”²

It is, however, to be observed that although the Court will, in cases of this description, give credit to the fact, as certified under the notarial seal of a notary public, it will require some evidence that the person, whose seal is affixed, actually fills the character he assumes; this may be effected either by the production of an affidavit by some person resident in this country who can depose to the fact of his being a notary public, or by the certificate of some public officer of the country in which the transaction took place, competent to give such certificate,³ which certificate must, however, be verified by the affidavit of some person resident here, conusant of the fact that the public officer who certifies is what he assumes to be.⁴

Thus, where a certificate that an affidavit was sworn before a magistrate in Prince of Wales’s Island, in the East Indies, was signed and sealed by the magistrate himself and by a notary public, the Lord Chancellor thought the evidence not sufficient; observing that, although a notary public by the law of nations has credit everywhere, and the Court, therefore, will give credit to him, yet it was necessary to prove that the other person was a magistrate.⁵

So, also, where an affidavit purported to be sworn before the mayor of Georgetown, in Columbia, in the United States, whose

¹ See *Sir J. Walrond v. Jacob*, 12 Vin. Ab. Ev. p. 123; A. b. 51, pl. 2, 8 Mod. 323; where the Court held that a plaintiff who was in Holland might make affidavit there, and get it attested by a notary public, and that it should be admitted as evidence to hold the defendant to special bail.

² *Hutcheon v. Mannington*, 6 Ves. 823. The Court will also admit the certificate of a notary, under his seal, in proof of the execution abroad of a power of attorney to receive money from the Accountant-General.

³ See *Lord Kinnaid v. Lady Saltoun*, 1 Mad. 227.

⁴ *Garvey v. Hibbert*, 1 J. & W. 180.

⁵ *Hutcheon v. Mannington*, *ubi supra*.

signature and seal were affixed, Sir T. Plumer, M. R., held, that although the affidavit purported to have been sworn before a person calling himself mayor, &c., there was no evidence to show who he was, and that something further was necessary to verify it.¹

It is to be observed, that, by the 6 Geo. IV. c. 87, s. 20, every *Consul-General* or *Consul* appointed by the sovereign of this country, at any foreign port or place, is authorized and empowered *whenever he shall be thereunto required and whenever he shall deem it necessary*, to administer at such foreign port or place, any oath, or take any affidavit or affirmation from any person or persons whomsoever, and also to do and perform, at such foreign port or place, all and every notarial acts or act which any notary public could or might be required to do within the United Kingdom of Great Britain and Ireland; and it is enacted, that every such oath, affidavit, or affirmation, and every such notarial act, administered, sworn, affirmed, had, or done by or before such Consul-General, or Consul, shall be as good, valid, and effectual, and shall be of like force and effect to all intents and purposes, as if any such oath, affidavit or affirmation, or notarial act respectively, had been administered, sworn, affirmed, had, or done, before any Justice of the Peace or notary public in any part of the United Kingdom of Great Britain and Ireland, *or before any other legal or competent authority of the like nature*. Under this Act, therefore, affidavits sworn before any Consul-General or Consul of her Majesty, resident at any port or other place abroad, may be received as evidence in the Court of Chancery, upon producing evidence to prove the signature of such Consul-General or Consul to the *jura*, and that the person signing the same is such Consul-General or Consul; an affidavit of which fact may, in general, be procured from some of the clerks in the Foreign Office.

It is said that an affidavit from the plantations cannot be read in this Court, unless under the seal of the island,² which seal must, also, be verified by the affidavit of some person here who knows the seal to be that of the colony.

Where an affidavit purported to have been sworn before a magistrate in India, proof was admitted, from the proceedings in the India House, to show that the person before whom it was sworn was a magistrate.³

¹ Garvey v. Hibbert, *ubi supra*.

² Annesley v. Earl of Anglesey, 1 Dick. 90.

³ Hutcheon v. Mannington, 6 Ves. 823.

An affidavit must be correctly entitled in the cause or matter in which it is made; for an affidavit made in one cause, cannot be read, to obtain an order in another;¹ it will, however, be sufficient if it was correctly entitled when it was sworn, although the title of the cause may have been subsequently altered by amendment; thus, where, at the time an affidavit was made, there were three defendants in the cause, and the affidavit was entitled in the cause accordingly, and afterwards the plaintiff amended his bill by striking out the name of one of the defendants, and then moved for and obtained an injunction on the affidavit as it was originally entitled, upon a motion to discharge the order for the injunction, on the ground that the affidavit on which it was obtained was improperly intituled, the V. C. of England refused the motion with costs.²

In all affidavits the true place of residence, description, and addition of every person swearing the same must be inserted.³ This rule, however, will not apply to affidavits by parties in the cause, who may describe themselves, in the affidavit, as the above-named plaintiff, or defendant, without specifying any residence or addition or other description: and even where a plaintiff so described himself in an affidavit, and it appeared, upon inspecting the office copy of the bill, that no addition had been given to him in the bill, the affidavit was considered sufficient.⁴ In that case, also, there were several plaintiffs, and the plaintiff making the affidavit described himself as "the above-named plaintiff," whereas, it was objected, that he ought to have called himself "one of the above plaintiffs," but the objection was overruled.⁵

With respect to the form of affidavits, the 126th Order of May,

¹ *Lumbrozo v. White*, 4 Dick. 150.

² *Hawes v. Bamford*, 9 Sim. 653. Although, in ordinary cases, the Court will disregard the misentitling of a paper, which could not have misled the opposite party, it is otherwise as respects affidavits; because the misentitling of an affidavit will exempt the defendant from the punishment of perjury, although his oath is false. *Hawley v. Donnelly*, 8 Paige, 415. See *Stafford v. Brown*, 4 Paige, 360. Where there are several defendants, and there is but one suit pending between the plaintiff and the defendant first named therein with others, it is sufficient in the entitling of an affidavit, to entitle it in the name of the plaintiff against the first defendant and others, without setting forth the names of all the defendants at length. *White v. Hess*, 8 Paige, 544.

³ Hind. 451; Prac. Reg. 9.

⁴ *Crockett v. Bishton*, 2 Mad. 446.

⁵ *Ibid.*

1845, directs, that "All affidavits are to be taken or expressed in the first person of the deponent."

The 127th of the same Orders directs, that "All copies of affidavits are to be ready for delivery within forty-eight hours after the same are bespoke."

By the 128th Order, "Any solicitor, party, or person, filing an affidavit, not taken or expressed in the first person of the deponent, is not to be allowed the costs of preparing and filing such affidavit in taxation of costs."

The affidavit must commence by stating, that the party *maketh oath* and saith, &c., for even though the *jurat* express that the party was sworn, it will not be sufficient unless the affidavit also state that the party maketh oath.¹

Where the deponent is a marksman, the *jurat* will be : —

Sworn, &c., the whole of the above affidavit having been first read over and explained to the said A. B., who appeared perfectly to understand the same, he made his mark in my presence.

Where a marksman signed an affidavit with his name at length, his hand having been guided on the occasion, the V. C. of England ordered it to be taken off the file.²

An affidavit must be true in substance, with all necessary circumstances of time, place, manner, and other material incidents ;³ it must also be sufficient to sustain the case made by the motion or petition of which it is the groundwork.⁴

It is to be observed, particularly, that every affidavit of service of writs, or of orders, upon which process of contempt is to be founded, must truly and fully prove good service ; and that if the plaintiff's name, the Court, the return of the writ, or anything material, be omitted, no attachment can be thereupon regularly

¹ Phillips v. Prentice, 2 Hare, 642.

² — v. Christopher, 10 Sim. 409. For the form of the *jurat* upon other occasions, see ante, p. 754.

³ Where the affidavit deposes to words spoken, the addition of "*or to that effect*," is a proper precaution ; Ayliffe v. Murray, 2 Atk. 60. An affidavit that the defendant has a good defence, without stating the nature and substance of it, is not sufficient. Sea Ins. Co. v. Stebbins, 8 Paige, 563. It is not the practice to receive a general affidavit of merits. The party must state upon oath what such merits are, to enable the Court to see whether they are not mere imaginary ; and in order that the defendant may be liable to punishment for perjury if his affidavit is false. Meach v. Chappell, 8 Paige, 135.

⁴ Hind. 451.

issued ; for, until a due service be shown, no contempt appears to the Court.¹

An affidavit must also be *pertinent and material*, without needless tautology and impertinent matter or other prolixities.² Scandalous and irrelevant matter should be carefully avoided, and, if any such are inserted, they may be expunged by the same process as scandal or impertinence in a bill or other pleading.³ We have seen, moreover, that the Court is now enabled, by the 122d Order of May, 1845,⁴ at once to declare an affidavit to be of improper length, or to refer it to the Taxing Master.

If the party complaining of scandal or impertinence in an affidavit, proceeds by reference, he must, as we have seen, take exceptions in writing ; and care must then be taken that he do not file affidavits in opposition to such parts of the officer's affidavits as he has excepted to, lest it may be construed as a waiver of the exceptions.⁵ Pending a reference for impertinence the affidavits cannot be used, though the Court, if necessary, may put the party upon terms.⁶

It may be mentioned here, that, where a whole petition was recited in an affidavit of service, the costs were ordered out of the solicitor's pocket.⁷

Affidavits ought to be fairly written in one hand, without blots

¹ Hind. 453.

² Ibid. See *Meach v. Chappell*, 8 Paige, 135.

³ For the course of proceeding upon scandal and impertinence in a bill, see ante, p. 353 *et seq.* It is to be observed, that this course of proceeding applies only to scandal and impertinence in affidavits to be used *in Court* ; where they are to be used *before a Master* a different course of proceeding to get the scandal or impertinence expunged must be adopted, see ante, p. 1195. It is competent for the Court, upon the mere examination of an affidavit or other paper read before it, on a motion, to order scandalous or impertinent matter contained in it to be expunged without reference to a Master, and to charge the proper party with the costs. *Powell v. Kane*, 5 Paige, 265. A party who makes an affidavit to oppose a motion, is only authorized to state the facts ; and it is scandalous and impertinent to draw inferences or state arguments in the affidavit, reflecting on the character or impeaching the motives of the adverse party or his solicitor. *Powell v. Kane*, 5 Paige, 265.

⁴ Ante, p. 361.

⁵ *Bickford v. Skewes*, 8 Sim. 206.

⁶ *Pearse v. Brook*, 3 Beav. 337.

⁷ *Ex parte Smith*, 1 Atk. 139. If a solicitor is compelled to pay the costs of expunging scandalous or impertinent matter, he has no legal or equitable claim upon his client to refund the amount. *Powell v. Kane*, 5 Paige, 265.

or interlineations of any words of substance, otherwise the Master may refuse to accept them ; or if he does accept them, the Clerk of Affidavits may refuse to file them.¹ Where, however, small blots or interlineations happen, the Master usually marks them, in the margin, with his initials.²

The time for swearing affidavits, at the public office, is between the hours of ten in the morning, and two in the afternoon, and of six and eight in the afternoon. They may be sworn at a Master's chambers or private house, at any time. If sworn before a Master extraordinary in the country, the Master must, at the foot, express the name of the town and country where it is taken, otherwise it will not be filed.³

The party swearing the affidavit must subscribe his Christian and surname on the left hand thereof. The *jurat* is written on the right. Any irregularity, in the form of the affidavit or of the *jurat*, will be a ground for the Court refusing to have it read.⁴

It is directed, by various Orders of the Court, and is the inviolable rule of practice, "That all affidavits of this Court, (excepting those only which belong to the Supplicavit Office,) shall before the same be exhibited in Court, or otherwise produced to ground any order, writ, process, or proceeding of Court thereupon, be brought into the office for registering affidavits, and be there duly filed and kept,⁵ and that neither the Registrar of the Court, his clerks, or deputies, shall, or do, at any time, draw up, sign, or set his or their hand or hands unto any order whatsoever grounded on any affidavit, unless such affidavit be first filed and registered with the Registrar of Affidavits,⁶ and attestation brought and

¹ Hind. 451.

² Ibid. ; and see Beames's Ord. 148.

³ Hind. 452 ; and see Beames's Ord. 148.

⁴ Ibid. As to the form of the *jurat*, see ante, p. 754. If the deponent is blind, the officer should certify in the *jurat*, that the affidavit was carefully and correctly read over to him, in the presence of such officer, before he swore to the same. Matter of Christie, 5 Paige, 242. So where the affiant has been found by the inquisition of a jury to be a lunatic, the officer before whom the affidavit is sworn, should state in the *jurat*, that he has examined the deponent for the purpose of ascertaining the state of his mind, and that he was apparently of sound mind, and capable of understanding the nature and contents of the affidavit. Matter of Christie, 5 Paige, 242.

⁵ See Bloodgood v. Clark, 4 Paige, 574, 576.

⁶ Now the Clerk of Affidavits.

showed to the said Registrar of this Court, under the hand of the said Registrar of Affidavits, or his deputy attending the said office.”¹

No affidavit ought to be used in Court unless an office copy of it has been first obtained; and in the case of *Jackson v. Cassidy*,² the V. C. of England dissolved a special injunction with costs because office copies of the affidavits in support of it had not been obtained when it was moved for.

This Order is now acted upon by the Court in all cases where affidavits are to be used in *Court*,³ in which case every affidavit must be filed with the Clerk of Affidavits, who will, upon the affidavit being filed, give an attested copy under his hand and stamp of office, to be read in Court. Sometimes, (when expedition is required,) the solicitor filing the affidavit, instead of waiting for an office copy by the Clerk of Affidavits, takes a copy of the affidavit to the office at the same time that he takes the original affidavit to be filed, and then the Clerk of Affidavits marks the copy as an office copy at the same time that he files the original.⁴

It is to be observed, that it is only where affidavits are to be made use of *in Court* that they are required to be filed; where they are to be used *before a Master*, they are not filed in the affidavit office, but are left in the Master's office, from which, if they are afterwards required in Court, they must be brought by the Master's clerk, in whose custody they are. In the case, however, of *Stubbs v. Sargon*,⁵ Lord Langdale, M. R., said, that whatever might be the custom, he thought the Masters ought not to make reports on affidavits which have not been previously regularly filed.

We have seen that by the 65th Order of 1828,⁶ “All affidavits which have been previously made and read in Court, upon any proceeding in a cause or matter, may be used before the Master.”

The converse of this rule, however, has not been adopted, and affidavits left with the Master can only be read in Court upon ex-

¹ Beames's Order, 148.

² 10 Sim. 326.

³ Hind. 452; Prac. Reg. 8; Curs. Can. 419; Har. (ed. Newland) 400. The Order will not apply to affidavits that accompany bills, which must be filed with the bill, and constitute part of the record, see p. 395.

⁴ Hind. 452.

⁵ 2 Beav. 497.

⁶ Ante, 1177.

ceptions or appeals from the Master's determination, and not to found any new order or process of the Court.¹

There is no particular time appointed for affidavits before applications are made to the Court, but all affidavits made to ground a motion, must be filed time enough, before such motion is made, to enable the adverse party to obtain a copy of it ; if not, the motion or petition which the affidavit is to support, must stand over :² this, however, will not apply to affidavits which cannot, according to the practice of the Court, be answered, as in the case of an affidavit to extend an injunction to stay trial.³

It is to be observed, that an affidavit, filed on the day of the date of a notice of motion, may be read upon the motion, although the notice was not served till some days after its date — *a party on whom a notice of motion is served being bound to search for affidavits as far back as the date of the notice of motion.*⁴

A party, however, is not bound to search for affidavits further back than the date of the notice ; if, therefore, an affidavit made in the cause and filed on a former occasion, is intended to be used upon the motion, notice of such intention should be given either in the original notice of motion, or by separate notice in writing, duly served.

It is laid down, that where the Court directs that affidavits shall be filed on both sides, by a certain day, and some of the affidavits on one side happen not to be filed on that day, it is the established rule of the Court not to enlarge the order further, in order that the other side may be enabled to give an answer to those affidavits.⁵

¹ The order as to filing affidavits with the clerks of affidavits, applies only to affidavits to be used in matters arising out of suits or summary applications to the Court as a Court of Equity ; all affidavits belonging to the *Supplicavit* office and the Petty Bag office, and all those touching lunatics and bankrupts, are to be filed in the several offices where such matters are transacted. Hind. 452.

² Hind. 252. As to the time in which a copy may be obtained, see 127th Order of May, 1845, ante, p. 1688. For the time of affidavits accompanying bills, see pp. 395, 398.

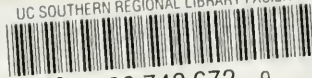
³ *Jones v. —*, 8 Ves. 46.

⁴ *Bowdler v. Bowdler*, 4 Law Jur. N. S. Chancery, 345.

⁵ *Burton v. Maloon*, Barnard, 401 ; but the affidavits so filed cannot be read.

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